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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1917.

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JUDGES

OF THE

SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

- " " JOHN JAMES MACLAREN, J.A.
- " " JAMES MAGEE, J.A.
- " " FRANK EGERTON HODGINS, J.A.
- " " WILLIAM NASSAU FERGUSON, J.A.

Second Divisional Court.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P.

- " " WILLIAM RENWICK RIDDELL, J.
- " " HAUGHTON LENNOX, J.
- " " HUGH EDWARD ROSE, J.

HIGH COURT DIVISION.

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., President.

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- " " BYRON MOFFATT BRITTON, J.
- " " ROGER CONGER CLUTE, J.
- " " FRANCIS ROBERT LATCHFORD, J.
- " " ROBERT FRANKLIN SUTHERLAND, J.
- " " WILLIAM EDWARD MIDDLETON, J.
- " " HUGH THOMAS KELLY, J.
- " " CORNELIUS ARTHUR MASTEN, J.

MEMORANDA.

CALL TO THE BAR.

22nd November, 1917.

James Daniel Becking, William Emery Wilson, Richard Dalton Moore Walter, Alexander David McKenzie, Hugh Amos Robson.

17th January, 1918.

Hugh Johnston McLaughlin.

7th February, 1918.

George Gordon Beckett, Hugh Stanley Honsberger, Leo Andrew Kelley.

ERRATA.

- Page 58, 16th line from bottom, for "defendants" read "plaintiffs."
Page 62, 13th line from bottom, for "place" read "plan."
Page 64, 12th line from bottom, for "survivors" read "survivor."
Page 72, 9th line from bottom, for "[1913]" read "[1903]."
Page 213, 13th line from top, for "250" read "260."
Page 227, 15th line of head-note, for "1912" read "1904."
Page 227, 18th line of head-note, for "(c)" read "(e)."
Page 233, 3rd line of catch-words, for "175" read "75."
Page 270, 3rd line of catch-words and 9th line of head-note, for "136" read "137."
Page 271, 17th line from top, for "136" read "137."
Page 290, 4th line of head-note, before "Davidson" insert "the opinion of PERDUE, J.A., in."
Page 290, 5th line of head-note, for "(1916), 30 D.L.R. 640" read "(1917), 33 D.L.R. 363."
Page 294, 18th line from bottom, for "(1916), 30 D.L.R. 640" read "(1917), 33 D.L.R. 363."
Page 443, 4th line of head-note, for "24" read "124."

CASES REPORTED.

A.		Canada Foundry Co., Henry Hope & Sons Limited v.(App. Div.)	338
Appelbe v. Windsor Security Co. of Canada Limited	(Chrs.) 548	Canadian Order of Chosen Friends, Re Nash and	(Chrs.) 530
Arthur & Co. (Export) Limited's Claim..	(App. Div.) 75	Canadian Pacific R.W. Co., Getty and Scott Limited v.....	260
Attorney-General for Ontario v. Harris Lithographing Co. Limited.....	290	Chatham Gas Co., Union Natural Gas Co. v.....	(App. Div.) 148
Axler, Rex v.....	(Chrs.) 304	Clarkson v. Dominion Bank	(App. Div.) 245
B.		Clement, Sparks v.....	487
B., D. v.....	(App. Div.) 112	Coates, Vanzant v.....	(App. Div.) 556
Baldwin v. O'Brien	(App. Div.) 24	Coleman and Toronto and Niagara Power Co., Re	(App. Div.) 130
Baldwin v. O'Brien.....	287	Confederation Life Association, Uren v.....	536
Bank of Hamilton, Holliday v.....	(App. Div.) 203	Conklin v. Dickson.....	(App. Div.) 460
Belleville, Local Board of Health of, Simpson v.	(App. Div.) 406	Conlin, Bradshaw v.....	(App. Div.) 494
Berger, Lampel v.....	165	Currie v. Harris Lithographing Co. Limited.....	290
Bigras v. Tasse..	(App. Div.) 415	D.	
Bradshaw v. Conlin	(App. Div.) 494	D., Re.....	(Chrs.) 365
Brantford, Township of, Delbridge v....	(App. Div.) 443	D. v. B.....	(App. Div.) 112
Broderick v. McKay	(App. Div.) 363	Davis, Rex v.....	(Chrs.) 352
Buckley v. Vair. (App. Div.)	465	Delbridge v. Township of Brantford....	(App. Div.) 443
Burrow, Struthers v.....	(App. Div.) 1	Devine v. Callery.....	(App. Div.) 505
C.		Dickson, Conklin v.....	(App. Div.) 460
Caldbick and Pierce, Maple Leaf Lumber Co. v.....	(App. Div.) 512	Dodge v. Smith.....	(C.A.) 362
Callery, Devine v.....	(App. Div.) 505	Dominion Bank, Clarkson v.....	(App. Div.) 245

E.

Eckert, London Electric Co. v.....(App. Div.)	208
Electrical Development Co. of Ontario Limited v. Com- missioners for Queen Vic- toria Niagara Falls Park.	480
Evans, Newcombe v.(Chrs.)	299

F.

Faulkners Limited, Re.....(App. Div.)	75
Fesserton Timber Co. Lim- ited, Mortimer v.....(App. Div.)	86
Fraser, Re Mitchell and(App. Div.)	389

G.

Gabel v. Howick Farmers Mutual Fire Insurance Co.	158
Gazey v. Toronto R.W. Co.(App. Div.)	449
Getty and Scott Limited v. Canadian Pacific R.W. Co.....	260
Ginsberg, Re....(App. Div.)	136
Grassi, Rex v.....(Chrs.)	359
Grosvenor Street Presby- terian Church Trustees, Re City of Toronto and...	550

H.

Hainer, May v...(App. Div.)	436
Harmston v. Woods, Re....(App. Div.)	171
Harris Lithographing Co. Limited, Attorney-General for Ontario v.....	290
Harris Lithographing Co. Limited, Currie v.....	290
Harty, Rat Portage Lumber Co. v.....(App. Div.)	322
Hill v. Toronto R.W. Co.(App. Div.)	393

Holliday v. Bank of Hamil- ton.....(App. Div.)	203
Hope (Henry) & Sons Lim- ited v. Canada Foundry Co.....(App. Div.)	338
Hossack, Shaw v.....(App. Div.)	475
Howick Farmers Mutual Fire Insurance Co., Gabel v....	158

J.

Jackson, Rex v..(App. Div.)	173
Jeffrey, McCabe v.....(App. Div.)	476n.

L.

Lampel v. Berger.....	165
Lees v. Morgan..(App. Div.)	233
Link v. Thompson.....	222
London and Lancashire Fire Insurance Co. Limited, Veltre v.....(App. Div.)	619
London Electric Co. v. Eckert.....(App. Div.)	208

M.

McAllister and Toronto and Suburban R.W. Co., Re(App. Div.)	252
McCabe v. Jeffrey.....(App. Div.)	476n.
McKay, Broderick v.....(App. Div.)	363
Mackell v. Ottawa Separate School Trustees.....	272
Magee Real Estate Co. Lim- ited's Claim.....	345
Makepeace, Union Bank of Canada v.....	368
Maldover v. Norwich Union Fire Insurance Co.....	532
Maple Leaf Lumber Co. v. Caldbeck and Pierce.....(App. Div.)	512
Martin, Rex v.....(Chrs.)	270

May v. Hainer.. (App. Div.)	436	Pneuma Tubes Limited, Sea-	
Merchants Bank of Canada,		gram v.....	301
Smith v..... (App. Div.)	309	Pohoretzky, Mizon v.....	
Metropolitan Theatres Lim-	 (App. Div.)	239
ited, Re.....	345		
Mitchell and Fraser, Re			
..... (App. Div.)	389		
Mizon v. Pohoretzky.....			
..... (App. Div.)	239		
Morgan, Lees v. (App. Div.)	233		
Morson, City of Toronto v.			
..... (App. Div.)	227		
Mortimer v. Fesserton Tim-			
ber Co. Limited			
..... (App. Div.)	86		

N.

Nash and Canadian Order	
of Chosen Friends, Re	
..... (Chrs.)	530
Newcombe v. Evans. (Chrs.)	299
Nolan, Re.....	355
Norwich Union Fire Insur-	
ance Co., Maldover v.....	532

O.

Obernesser, Rex v.... (Chrs.)	264
O'Brien, Baldwin v.....	
..... (App. Div.)	24
O'Brien, Baldwin v.....	287
Ontario Hughes-Owens Lim-	
ited v. Ottawa Electric	
R.W. Co..... (App. Div.)	614
Orr, Re..... (App. Div.)	567
Ottawa Electric R.W. Co.,	
Ontario Hughes - Owens	
Limited v.... (App. Div.)	614
Ottawa Separate School	
Trustees, Mackell v.....	272
Otto v. Roger and Kelly	
..... (App. Div.)	381

P.

Perry, Superior Copper Co.	
Limited v..... (Chrs.)	467

Q.

Quebec Bank, City of Tor-	
onto v.....	544
Queen Victoria Niagara Falls	
Park, Commissioners for,	
Electrical Development Co.	
of Ontario Limited v.....	480

R.

Rat Portage Lumber Co. v.	
Harty..... (App. Div.)	322
Rex v. Axler..... (Chrs.)	304
Rex v. Davis..... (Chrs.)	352
Rex v. Grassi..... (Chrs.)	359
Rex v. Jackson.. (App. Div.)	173
Rex v. Martin..... (Chrs.)	270
Rex v. Obernesser.... (Chrs.)	264
Rex v. Tugman..... (Chrs.)	349
Rex v. Warne Drug Co.	
Limited..... (Chrs.)	469
Rex v. Weller..... (Chrs.)	296
Roblin v. Vanalstine.....	
..... (App. Div.)	99
Roger and Kelly, Otto v.	
..... (App. Div.)	381
Rutherford, Re.....	266

S.

Seagram v. Pneuma Tubes	
Limited.....	301
Shaw v. Hossack (App. Div.)	475
Simpson v. Local Board of	
Health of Belleville.....	
..... (App. Div.)	406
Smith, Dodge v..... (C.A.)	362
Smith v. Merchants Bank of	
Canada..... (App. Div.)	309
Somerville, Stark v.....	374
Southby v. Southby.....	
..... (App. Div.)	429

Sparks v. Clement.....	487
Stark v. Somerville.....	374
Struthers v. Burrow.....	
.....(App. Div.)	1
Superior Copper Co. Limited v. Perry.....(Chrs.)	467

T.

Tasse, Bigras v..(App. Div.)	415
Thompson, Link v.....	222
Toronto and Niagara Power Co., Re Coleman and....	
.....(App. Div.)	130
Toronto Suburban R.W. Co., Re McAllister and.....	
.....(App. Div.)	252
Toronto, City of, and Grosvenor Street Presbyterian Church Trustees, Re.....	550
Toronto, City of, v. Morson.....(App. Div.)	227
Toronto, City of, v. Quebec Bank.....	544
Toronto, City of, Upper Canada College v.....	483
Toronto R.W. Co., Gazey v.....(App. Div.)	449
Toronto R.W. Co., Hill v.....(App. Div.)	393
Tugman, Rex v.....(Chrs.)	349

U.

Union Bank of Canada v. Makepeace.....	368
Union Natural Gas Co. v. Chatham Gas Co.....	
.....(App. Div.)	148
Upper Canada College v. City of Toronto.....	483
Uren v. Confederation Life Association.....	536

V.

Vair, Buckley v..(App. Div.)	465
Vanalstine, Roblin v.....	
.....(App. Div.)	99
Vanzant v. Coates.....	
.....(App. Div.)	556
Veltre v. London and Lancashire Fire Insurance Co. Limited.....(App. Div.)	619

W.

Walker (Hiram) & Sons Limited and Town of Walkerville, Re.....(App. Div.)	154
Warne Drug Co. Limited, Rex v.....(Chrs.)	469
Weller, Rex v.....(Chrs.)	296
Windsor Security Co. of Canada Limited, Appelbe v.....(Chrs.)	548
Woods, Re Harmston v.....	
.....(App. Div.)	171

CASES CITED.

NAME OF CASE.	A.	WHERE REPORTED.	PAGE
Abbott v. City of St. John.....	40	S.C.R. 597.....	227, 228, 229, 230, 233
Adams v. Fairweather.....	13	O.L.R. 490.....	39, 71
Adams v. Loughman.....	39	U.C.R. 247.....	39
Allcard v. Skinner.....	36	Ch.D. 145.....	556, 562, 565
Allen, In re.....	[1905]	2 Ch. 400, 21 Times L. R. 662.....	568, 598
Allen Manufacturing Co. v. Murphy.....	23	O.L.R. 467.....	241
Allgood v. Blake.....		L.R. 8 Ex. 160.....	572
Anderson v. Elsworth.....	3	Giff. 154.....	557
Anning v. Anning.....	38	O.L.R. 277, 34 D.L.R. 193.....	430, 439
Archer v. Hudson.....	7	Beav. 551.....	562
Armour v. Bate.....	[1891]	2 Q.B. 233.....	312
Armstrong v. Armstrong.....	14	Gr. 528.....	557, 560, 561
Armstrong v. Lancashire Insurance Co....	2	O.W.R. 599.....	625
Arscott v. Lilley.....	11	O.R. 153, 285.....	178, 180, 191, 195
Askwith, Re.....	31	O.R. 150.....	137
Attorney-General v. Esher Linoleum Co. Limited.....	[1901]	2 Ch. 647.....	38, 60
Attorney-General v. Herrick.....	Ambl.	712.....	610
Attorney-General v. Horner.....	[1913]	2 Ch. 140.....	54, 71
Attorney-General v. London and North Western R.W. Co.....	[1892]	3 Ch. 274.....	480, 481
Attorney-General v. Salt Union Limited.....	33	Times L.R. 365, [1917] 2 K.B. 488.....	154, 157
Attorney-General v. Sturge.....	19	Beav. 597.....	586
Attorney-General for New Zealand v. Brown.....	[1917]	A.C. 393.....	581, 586, 588
Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool) Limited.....	[1915]	A.C. 599.....	39, 71
Ayr Harbour Trustees v. Oswald.....	8	App. Cas. 623.....	131, 134

B.

Baddeley v. Granville.....	19	Q.B.D. 423.....	497
Baddeley v. Mortlock.....	Holt	N.P. 151.....	126
Baeder and Canadian Order of Chosen Friends, Re.....	36	O.L.R. 30, 28 D.L.R. 424.....	266, 268
Baker, Ex p.....	7	E. & B. 697.....	193
Baker, In re.....	2	H. & N. 219.....	193
Baldwin v. O'Brien.....	40	O.L.R. 24.....	287
Bank of Commerce v. British America Assurance Co.....	18	O.R. 234.....	626
Bank of Hamilton v. Halstead.....	28	S.C.R. 235.....	245, 246, 249
Bank of Hamilton v. John T. Noye Manufacturing Co.....	9	O.R. 631.....	246
Bank of Hamilton v. Shepherd.....	21	A.R. 156.....	246
Bank of Montreal v. Stuart.....	[1911]	A.C. 120.....	557
Barlow v. Heneage.....		Prec. in Ch. 210.....	347
Barnett v. Eastman.....	67	L.J.N.S.Q.B. 517.....	203, 205, 206
Barrack v. McCulloch.....	3	K. & J. 110.....	434
Barry v. Butlin.....	2	Moo. P.C. 480.....	565, 566
Beal v. Michigan Central R.R. Co.....	19	O.L.R. 502.....	409, 414

NAME OF CASE.	WHERE REPORTED.	PAGE
Beamish v. James Richardson & Sons Limited.....	49 S.C.R. 595.....	377
Beanland v. Bradley.....	2 Sm. & G. 339.....	560
Beaver v. Reed.....	9 U.C.R. 152.....	506
Bell v. Ross.....	11 A.R. 458.....	368, 371, 373
Bell Brothers v. Hudson Bay Insurance Co.....	44 S.C.R. 419.....	162
Bellamy v. Timbers.....	31 O.L.R. 613, 19 D.L.R. 488.....	475
Benallack v. Bank of British North America.....	36 S.C.R. 120.....	205
Berry v. Da Costa.....	L.R. 1 C.P. 331.....	128
Beverley, Mayor etc. of, v. Attorney-General.....	6 H.L.C. 310.....	585
Bew v. Bew.....	[1899] 2 Ch. 467.....	466
Billage v. Southee.....	9 Hare 534.....	562
Bilton v. Mackenzie.....	31 O.L.R. 585.....	5
Bingley v. Marshall.....	9 L.T.R. 144.....	486
Birmingham v. Malone.....	32 C.L.J. 717.....	206
Blair v. Duncan.....	[1902] A.C. 37.....	587
Bland v. Brown.....	37 O.L.R. 534.....	287, 288
Bleakley v. Smith.....	11 Sim. 150.....	490
Blewitt v. Blewitt.....	4 Hagg. Eccl. 410.....	565, 566
Bolton and County of Wentworth, Re.....	23 O.L.R. 390.....	278, 279
Borrowman v. Drayton.....	2 Ex. D. 15.....	221
Bosley v. Davies.....	1 Q.B.D. 84.....	364
Boston Fruit Co. v. British and Foreign Marine Insurance Co.....	[1906] A.C. 336.....	88
Bowen, In re.....	[1893] 2 Ch. 491.....	586
Bowman v. Milbanke.....	1 Lev. 130, 1 Sid. 191, T. Raym. 97, 1 Keble 719.....	602
Bowman v. Secular Society Limited.....	[1917] A.C. 406.....	585, 588, 611
Bowman, In re, Secular Society Limited v. Bowman.....	[1915] 2 Ch. 447.....	584
Boyd v. Haynes.....	5 P.R. 15.....	322, 324, 329
Boyes v. Cook.....	14 Ch.D. 53.....	572
Bradlaugh v. Edwards.....	11 C.B.N.S. 377.....	113
Brady, Re.....	21 Can. Crim. Cas. 123, 10 D.L.R. 423.....	177, 192
Brawley v. United States.....	96 U.S. (6 Otto) 168.....	209, 216, 221
Breese v. Knox.....	24 A.R. 203.....	246
Brenner v. Toronto R.W. Co.....	13 O.L.R. 423.....	618
Brett v. Toronto R.W. Co.....	13 O.W.R. 552.....	39
Bridges v. North London R.W. Co.....	24 L.T.R. 835.....	454, 455
Brine v. Great Western R.W. Co.....	2 B. & S. 402.....	425
British and American Telegraph Co. v. Colson.....	L.R. 6 Ex. 108.....	626
British Columbia Electric R.W. Co., Limited v. Loach.....	[1916] 1 A.C. 719, 23 D.L.R. 4.....	23
Brown v. Metropolitan Counties Life Assurance Society.....	28 L.J.N.S.Q.B. 236.....	506
Bruner v. Moore.....	[1904] 1 Ch. 305.....	626
Burkill v. Thomas.....	[1892] 1 Q.B. 99, 312.....	364
Burnham v. Daly.....	11 U.C.R. 211.....	204
Buron v. Denman.....	2 Ex. 167.....	425
Bushel's Case.....	T. Jones 13, Vaughan 135, 6 Howell's State Trials 999.....	200
Butts v. Goodard.....	4 Times L.R. 193.....	5, 19
Bywater, In re.....	18 Ch. D. 17.....	357

C.

Cain v. Lancashire Insurance Co.....	27 U.C.R. 217, 453.....	625
Caisley v. Stewart.....	21 Man. R. 341.....	491
Caldwell v. Stadacona Fire and Life Insurance Co.....	11 S.C.R. 212.....	625

NAME OF CASE.	WHERE REPORTED.	PAGE
Caledonian R.W. Co. v. Glenboig Union Fireclay Co.	[1911] A.C. 290.	252, 253, 255, 256, 257
Calgary, City of, v. Harnovis.	48 S.C.R. 494.	617
Callow v. Young.	56 L.J. Ch. 690, [1886] W.N. 209.	225, 226
Campbell v. Beamish.	8 U.C.R. 526.	113
Campbell v. Farley.	18 P.R. 97.	345
Campbell v. Smith.	10 Gr. 206.	527
Campbell v. Walsh.	18 Can. Crim. Cas. 304.	180
Canada Cork Co., Re.	Parker's Company Law, p. 390.	468
Canadian Pacific R.W. Co. v. Hinrich.	48 S.C.R. 557.	617
Carnarvon (Earl of) v. Villebois.	13 M. & W. 313.	50
Carne v. Long.	2 DeG. F. & J. 75.	586
Carringtons Limited v. Smith.	[1906] 1 K.B. 79.	479
Carysfort, Earl of, In re.	Cr. & Ph. 76.	367
Catterall v. Sweetman.	9 Jur. 951.	206
Central Bank of Canada v. Ellis.	20 A.R. 364.	324
Chamberlayne v. Brockett.	L.R. 8 Ch. 206.	569, 588, 599
Chambers v. Jaffray.	12 O.L.R. 377.	136, 138, 139
Chatterton v. Watney.	16 Ch. D. 378.	324, 331
Cheney v. Cameron.	6 Gr. 623.	39
Chinnery v. Evans.	11 H.L.C. 115.	374, 378, 379
Christie v. Casey.	31 C.L.J. 35.	206
Clark's Trusts, In re.	1 Ch. D. 497.	586
Clergue v. Plummer.	38 O.L.R. 54.	494
Coats v. Herefordshire County Council.	[1909] 2 Ch. 579.	39
Cockburn v. Edwards.	18 Ch. D. 449.	374, 378, 379
Cockle v. London and South Eastern R.W. Co.	L.R. 7 C.P. 321.	456
Cocks v. Manners.	L.R. 12 Eq. 574.	568, 585, 587, 598
Cole v. Langford.	[1898] 2 Q.B. 36.	316
Colonial Bank v. Cady and Williams.	15 App. Cas. 267.	468
Columbia Bitulithic Limited v. British Columbia R.W. Co.	55 S.C.R. 1.	618
Colville v. Small.	22 O.L.R. 426.	99
Combined Weighing and Advertising Machine Co., In re.	43 Ch. D. 99.	331
Commercial Bank v. Jarvis.	5 U.C.L.J.O.S. 66.	205
Commissioner for Railways v. Brown.	13 App. Cas. 133.	450, 460
Commissioners for Special Purposes of Income Tax v. Pemsel.	[1891] A.C. 531.	577, 585, 587, 595
Confederation Life Association v. La- batt (No. 2).	18 P.R. 266.	530
Conn v. Smith.	28 O.R. 629.	319
Connacher v. City of Toronto.	Unreported.	409
Cooke v. Lamotte.	15 Beav. 234.	562, 564
Coomber, In re.	[1911] 1 Ch. 174, 723.	561
Cooper v. Knight.	17 Times L.R. 299.	468
Copestake v. West Sussex County Council.	[1911] 2 Ch. 331.	39
Cornell v. Smith.	14 P.R. 275.	152
Corrie v. MacDermott.	[1914] A.C. 1056.	133
Covell v. Loud.	135 Mass. 41.	378
Cowan's Estate, In re.	14 Ch. D. 638.	204
Cowley v. Watts.	22 L.J.N.S. Ch. 591.	491
Cox v. Hakes.	15 App. Cas. 506.	193
Coy, In re.	127 U.S. 731.	200, 201
Cripps v. Woessner.	36 D.L.R. 80.	567
Critchley v. Canadian Northern R.W. Co.	34 D.L.R. 245.	618
Curry v. Canadian Pacific R.W. Co.	17 O.R. 65.	395

D.

NAME OF CASE.	WHERE REPORTED.	PAGE
D. v. A. Co.....	[1900] 1 Ch. 484.....	225
Da Costa, In re.....	[1912] 1 Ch. 337.....	587
Daimler Co. Limited v. Continental Tyre and Rubber Co. (Great Britain) Limited.....	[1916] A.C. 307.....	165, 168
Dale v. Toronto R.W. Co.....	34 O.L.R. 104, 24 D.L.R. 413	113, 124
Dalton v. Township of Ashfield.....	26 A.R. 363.....	446
Danger v. London Street R.W. Co.....	30 O.R. 493.....	615
Darling, In re.....	39 Ch. D. 208.....	366
Darling, In re.....	[1896] 1 Ch. 50.....	569, 584, 585, 605, 608
Darling v. Corbett.....	8 U.C.R. 72.....	524
Davidson, In re.....	[1909] 1 Ch. 567.....	584, 587
Davidson v. Great West Saddlery Co.....	35 D.L.R. 526, 27 Man. R. 576	290, 293, 294
Davies, In re.....	[1898] 2 Ch. 142.....	239
Davies v. James Bay R.W. Co.....	[1914] A.C. 1043.....	253
Davis v. Bennet.....	30 Beav. 226.....	358
Davis & Co., In re.....	22 Q.B.D. 193.....	506
Deere (John) Plow Co. Limited v. Wharton.....	[1915] A.C. 330.....	290, 292, 294
De La Warr (Earl) v. Miles.....	17 Ch. D. 535.....	40, 71
Delany, In re.....	[1902] 2 Ch. 642.....	587
Desrosiers v. Burdon.....	7 Q.P.R. 395.....	378
Dickson Co. of Peterborough and Graham, Re.....	27 O.L.R. 239.....	390
D'Ivry v. World Newspaper Co. of Toronto.....	17 P.R. 387.....	137, 283
Dix v. Great Western R.W. Co.....	34 W.R. 712.....	152
Dobson v. Horsley.....	[1915] 1 K.B. 634.....	4
Dodge v. Meech.....	1 Hagg. Eccl. 612.....	565, 566
Dodge v. Smith.....	2 O.W.R. 561.....	362
Doe d. Dissett v. McLeod.....	3 U.C.R. 297.....	528
Doe d. Garnons v. Knight.....	5 B. & C. 671.....	347
Doe d. Hughes v. Jones.....	9 M. & W. 372.....	204
Doe d. Moffat v. Hall.....	Tay. 510.....	528
Doe d. Vancott v. Read.....	3 U.C.R. 244.....	586
Dolan v. Baker.....	10 O.L.R. 259.....	133
Donaldson v. Donaldson.....	12 Gr. 431.....	566
Dougall v. Turnbull.....	8 U.C.R. 622.....	205
Dougan v. Macpherson.....	[1902] A.C. 197.....	236
Doyle, Re.....	5 O.W.N. 911.....	587
Dunlop v. Higgins.....	1 H.L.C. 381.....	633
Dunn, In re.....	17 L.J.N.S.C.P. 97.....	190
Dunne v. Byrne.....	[1912] A.C. 407.....	587, 588
Dyson v. Attorney-General.....	[1911] 1 K.B. 410, [1912] 1 Ch. 158.....	480, 481, 482

E.

Eastes v. Russ.....	[1914] 1 Ch. 468.....	241
Edgar v. Northern R. W. Co.....	11 A.R. 452.....	454, 459
Edge v. Kavanagh.....	34 L.R. Ir. 1.....	513, 527
Edward v. Cheyne (No. 2).....	13 App. Cas. 385.....	430
Edwards v. Edwards.....	[1909] A.C. 275.....	586
Elizabethtown, Township of, v. Town- ship of Augusta.....	2 O.L.R. 4.....	381
Elliott v. Merchants Bank and Trust Co..	21 Cal. App. 536.....	348
Ellis v. Selby.....	7 Sim. 352.....	587
Emerson v. Bannerman.....	19 S.C.R. 1.....	364
Empey v. Fick.....	13 O.L.R. 178, 15 O.L.R. 19.....	561
England v. Boston and Maine Railroad...	153 Mass. 490.....	454, 457

NAME OF CASE.	WHERE REPORTED.	PAGE
Erie County Natural Gas and Fuel Co. v. Carroll.....	[1911] A.C. 105.....	151
Evans, In re.....	21 Ch. D. 297.....	367
Evans, In re.....	[1893] 1 Ch. 252.....	224, 226
Evans v. Grey.....	9 L.R. Ir. 539.....	347
Everly v. Dunkley.....	27 O.L.R. 414, 8 D.L.R. 839...	435

F.

Farquhar v. Newbury Rural District Council.....	[1908] 2 Ch. 586.....	46
Feather v. The Queen.....	6 B. & S. 257.....	415, 423, 427, 428
Felan v. Russell.....	4 Ir. Eq. R. 701.....	585, 605
Fellows v. Thornton.....	14 Q.B.D. 335.....	324, 331
Ferris v. Hamilton.....	9 Gr. 362.....	430
Finlay v. Chirney.....	20 Q.B.D. 494.....	127, 129
Folkestone Corporation v. Brockman...	[1914] A.C. 338.....	38, 69, 70
Foster v. Township of St. Joseph.....	39 O.L.R. 114, 525.....	382
Freeman, In re.....	[1908] 1 Ch. 720.....	584, 587
Freston, In re.....	11 Q.B.D. 545.....	284

G.

Gage v. Reid.....	38 O.L.R. 514, 34 D.L.R. 46113, 115, 121, 122, 124	
Garnett, In re.....	31 Ch. D. 1.....	234, 238
Garnett v. McKewan.....	L.R. 8 Ex. 10.....	250
Gassiot, In re.....	70 L.J. Ch. 242.....	587
Gault v. Murray.....	21 O.R. 458.....	483, 484
Gayle's Administrator v. Louisville and Nashville R. Co.....	173 S.W. Repr. 1113.....	454, 458
Geck, Re.....	69 L.T.R. 819.....	584
Gibb v. The King.....	52 S.C.R. 402, 27 D.L.R. 262..	131
Gibbons (J.J.) Limited v. Berliner Gramophone Co.....	4 O.W.N. 1068, 10 D.L.R. 825.	138
Gibson and City of Toronto, Re.....	28 O.L.R. 20, 11 D.L.R. 529...	133
Gilroy v. Conn.....	3 O.W.N. 732, 2 D.L.R. 131322, 329	
Gingell Son & Foskett Limited v. Stepney Borough Council.....	[1906] 2 K.B. 468.....	482
Ginsberg, Re.....	12 O.W.N. 284, 40 O.L.R. 136273, 285	
Glegg v. Broimley.....	[1912] 3 K.B. 474.....	332
Good, In re.....	[1905] 2 Ch. 60.....	595
Goodman v. Goodman.....	1 DeG. & Sm. 695.....	602
Gorman v. Dixon.....	26 S.C.R. 87.....	373
Gorris v. Scott.....	L.R. 9 Ex. 125.....	414
Graham v. Ontario Mutual Insurance Co.....	14 O.R. 358.....	158, 164
Grand Trunk R.W. Co. v. Griffith.....	45 S.C.R. 380.....	410
Gray v. McLennan.....	3 Man. R. 337.....	505, 510
Gray v. Town of Dundas.....	11 O.R. 317, 13 A.R. 588.....	443, 448
Great Western R.W. Co. v. Carpalla United China Clay Co. Limited.....	[1910] A.C. 83.....252, 253, 254, 255, 256	
Great Western R.W. Co. v. Fletcher....	5 H. & N. 689.....	253
Griffith v. Blake.....	27 Ch. D. 474.....	486
Griffiths v. Robins.....	3 Mad. 191.....	561, 562
Grimond (or Macintyre) v. Grimond....	[1905] A.C. 124.....	584, 587, 588
Groves v. Wimborne.....	[1898] 2 Q.B. 402.....	497
Gwillim v. Daniell.....	2 C.M. & R. 61.....	216

H.	NAME OF CASE.	WHERE REPORTED.	PAGE
	Hallen v. Runder.....	1 C.M. & R. 266.....	505, 511
	Halsted v. Bank of Hamilton.....	27 O.R. 435, 24 A.R. 152.....	246
	Hamilton v. Johnson.....	5 Q.B.D. 263.....	23
	Hamilton's Case.....	3 D. 1121.....	256
	Hanson v. Lancashire and Yorkshire R.W. Co.....	20 W.R. 297.....	21
	Hargrave v. Royal Templars of Tem- perance.....	2 O.L.R. 126.....	289
	Harmer v. A. Macdonald Co. Limited....	33 D.L.R. 363.....	290, 294
	Harmston v. Woods, Re.....	39 O.L.R. 105.....	171
	Harpham v. Shacklock.....	19 Ch. D. 207.....	466
	Harris v. Du Pasquier.....	20 W.R. 668.....	587
	Harrison and Micks Lambert and Co., In re.....	[1917] 1 K.B. 755, 33 Times L.R. 221.....	208, 209, 213, 214, 221
	Hartlepool Gas and Water Co. v. West Hartlepool Harbour and R.W. Co....	12 L.T.R. 366.....	149, 151
	Harvey v. Harvey.....	26 Ch. D. 644.....	223
	Healey v. Corporation of Batley.....	L.R. 19 Eq. 375.....	39
	Healy v. Ross.....	32 O.L.R. 184, 33 O.L.R. 368, 22 D.L.R. 408.....	382, 388
	Heath v. Chapman.....	2 Drew. 417.....	587
	Henthorn v. Fraser.....	[1892] 2 Ch. 27.....	633
	Hick v. Raymond & Reid.....	[1893] A.C. 22.....	338, 342
	Hiscox v. Lander.....	24 Gr. 250.....	415, 416, 421, 423, 428
	Hislop v. City of Stratford.....	38 O.L.R. 470, 34 D.L.R. 31.....	382
	Hitchcock v. Coker.....	6 A. & E. 438.....	241
	Hobson v. Gorringer.....	[1897] 1 Ch. 182.....	510
	Hobson v. Thelluson.....	L.R. 2 Q.B. 642.....	524
	Hoerter v. Hanover Caoutchouc Gutta Percha and Rubber Works.....	10 Times L.R. 104.....	468
	Holden v. Liverpool New Gas Co.....	3 C.B. 1.....	460, 464
	Hollinshead v. Hazleton.....	[1916] 1 A.C. 428.....	322, 333
	Holmes v. North Eastern R.W. Co.....	L.R. 4 Ex. 254, L.R. 6 Ex. 123.....	5
	Horton v. Mead.....	[1912] W.N. 304.....	189
	Horwich v. Symond.....	110 L.T.R. 1016, 84 L.J.K.B. 1083.....	505, 511
	Household Fire Insurance Co. v. Grant....	4 Ex. D. 216.....	633
	How v. Earl Winterton.....	[1896] 2 Ch. 626.....	239
	Howley Park Coal and Cannel Co. v. London and North Western R.W. Co.	[1913] A.C. 11.....	253
	Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited.....	[1899] 1 Q.B. 86.....	480, 481
	Hughes v. Oxenham.....	[1913] 1 Ch. 254.....	468
	Hughes v. United Empire Club.....	Unreported.....	67, 71
	Huguenin v. Baseley.....	14 Ves. 273.....	557
	Hulse, In re.....	[1905] 1 Ch. 406.....	505, 511
	Hunter v. Atkins.....	3 Myl. & K. 113.....	561, 562, 564
	Hunter v. Attorney-General.....	[1899] A.C. 309.....	584, 587
	Hunter v. Richards.....	28 O.L.R. 267, 12 D.L.R. 503.....	47, 70
	Hurst v. Picture Theatres Limited.....	[1915] 1 K.B. 1.....	506
	Hutchings v. Ruttan.....	6 U.C.C.P. 452.....	529
	Hutt v. Shaw.....	3 Times L.R. 354.....	323
	Huyck, Re.....	10 O.L.R. 480.....	584, 588

I.

Imperial Land Co. of Marseilles, In re, Harris' Case.....	L.R. 7 Ch. 587.....	626, 633
Imperial Paper Mills of Canada Limited v. Quebec Bank.....	26 O.L.R. 637, 6 D.L.R. 475, 83 L.J.P.C. 67, 110 L.T.R. 91.....	245, 246, 250, 251, 252

NAME OF CASE.	WHERE REPORTED.	PAGE
Indermaur v. Dames.....	L.R. 1 C.P. 274, L.R. 2 C.P. 311.....	4, 5, 15, 16
International Tea Stores Co. v. Hobbs..	[1905] 2 Ch. 165.....	39, 72
Isaac, In re.....	[1905] 1 Ch. 427.....	358

J.

Jackson v. Kassel.....	26 U.C.R. 341.....	363, 364
James v. Clement.....	13 O.R. 115.....	23
Janson v. Driefontein Consolidated Mines Limited.....	[1902] A.C. 484.....	165, 167
Jarman's Estate, In re.....	8 Ch. D. 584.....	610
Jarvis v. Brooke.....	11 U.C.R. 299.....	514
Jefferson v. Paskell.....	[1916] 1 K.B. 57.....	126
Jenkins v. Great Western Railway.....	[1912] 1 K.B. 525.....	4
Jessop, In re.....	11 Ir. Ch. R. 424.....	358
Johns v. Wilson.....	[1900] 1 I.R. 342.....	358
Johnston v. Great Western R.W. Co....	[1904] 2 K.B. 250.....	129
Jones v. Hope.....	3 Times L.R. 247 (note).....	87
Joy, Re.....	60 L.T.R. 175.....	587
Jureidini v. National British and Irish Millers Insurance Co. Limited.....	[1915] A.C. 499.....	627

K.

Kay v. Storry, In re.....	8 O.L.R. 45.....	138
Keefer v. Phoenix Insurance Co. of Hartford.....	31 S.C.R. 144.....	532, 536
Keighley Maxsted & Co. v. Durant....	[1901] A.C. 240.....	87
Keightley v. Birch.....	3 Camp. 521.....	513
Keith v. Ottawa and New York R.W. Co.....	5 O.L.R. 116.....	456
Kemerer v. Watterson.....	20 O.L.R. 451.....	468
Kendall v. Granger.....	5 Beav. 300.....	582, 584, 587
Kennedy v. Kennedy.....	24 O.L.R. 183.....	586
Kenny, Re.....	97 L.T.R. 130.....	585
Ker v. Little.....	25 A.R. 387.....	40
Ker v. Williams.....	29 Sol. J. 681.....	312
Kerr v. Townsend.....	12 O.W.N. 166.....	617
Kilvington v. Parker.....	21 W.R. 121.....	358
Kinseley v. British America Assurance Co.....	32 O.R. 376.....	164
Kinsella v. Pask.....	28 O.L.R. 393.....	562
Kirk v. Burgess.....	15 O.R. 608.....	205
Kolchmann v. Meurice.....	[1903] 1 K.B. 534.....	468

L.

Laing v. Matthews.....	14 Gr. 36.....	527
Lancaster v. Eve.....	5 C.B.N.S. 717.....	510
Lancey v. Brake.....	10 O.R. 428.....	23
Lange, Ex p.....	18 Wall. 163.....	199
Langley v. Palter.....	13 O.W.R. 951.....	205
Latham v. R. Johnson & Nephew Limited.....	[1913] 1 K.B. 398.....	5
Lea, In re.....	34 Ch. D. 528.....	585
Lee v. Gaskell.....	1 Q.B.D. 700.....	505, 511
Lee v. Howes.....	30 U.C.R. 292.....	515, 528
Leeming v. Armitage.....	18 P.R. 486.....	316
Leeming v. Snaith.....	16 Q.B. 275.....	216
Lees, Ex p.....	E. B. & E. 828.....	198

NAME OF CASE.	WHERE REPORTED.	PAGE
Leng (Sir W. C.) & Co. Limited v. Andrews.....	[1909] 1 Ch. 763.....	241
Leprohon v. City of Ottawa.....	2 A.R. 522.....	228, 232
Levi and Brouse Island Guano Co. Limited v. F.W. Berk and Co.....	2 Times L.R. 898.....	214
Lewis v. London Chatham and Dover R.W. Co.....	L.R. 9 Q.B. 66.....	454, 456
Liles v. Terry.....	[1895] 2 Q.B. 679.....	564
Litchfield v. Dreyfus.....	[1906] 1 K.B. 584.....	479
Llanover v. Homfray.....	19 Ch. D. 224.....	466
Loach v. British Columbia Electric R.W. Co.....	[1916] 1 A.C. 719.....	614, 616, 618
London and North-Western R.W. Co. v. Hellawell.....	26 L.T.R. 557.....	454, 455
Lopez v. Chavarri.....	[1901] W.N. 115.....	468
Lovell v. Newton.....	4 C.P.D. 7.....	430
Lowery v. Walker.....	[1911] A.C. 10.....	10
Lucas Tanner & Co., Re.....	32 O.R. 1.....	138
Lumbers and Howard, In re.....	9 O.L.R. 680.....	390
Lumley v. Wagner.....	1 DeG. M. & G. 604.....	152
Lyell v. Lord Hothfield.....	[1914] 3 K.B. 911.....	39
Lyman v. Royal Trust Co.....	31 D.L.R. 757.....	587
Lyon v. Home.....	L.R. 6 Eq. 655.....	561
M.		
McCabe v. Jeffrey.....	40 O.L.R. 476 (note).....	475, 476
McCaffrey v. McCaffrey.....	18 A.R. 599.....	557
McCandy v. Tuer.....	24 U.C.C.P. 101.....	430
McCauley, Re.....	28 O.R. 610.....	586
McCheane v. Gyles (No. 2).....	[1902] 1 Ch. 911.....	152
McClung v. McCracken.....	2 O.R. 609, 3 O.R. 596.....	493
McConnel v. Murphy.....	L.R. 5 P.C. 203.....	216
McConnell v. Hector.....	3 B. & P. 113.....	167
McConnell v. McGee.....	39 O.L.R. 460.....	171, 172
McCrimmon v. Township of Yarmouth..	27 A.R. 636.....	382, 445
McDonald v. Cameron.....	13 Gr. 84.....	515, 528
Macdonald v. McDonald.....	11 O.R. 187.....	228
McDonald v. Murray.....	5 O.R. 559.....	113, 124
Macdougall v. Knight.....	25 Q.B.D. 1.....	310
MacDougall v. Paille.....	24 O.W.R. 912, 4 O.W.N. 1602, 13 D.L.R. 661.....	567
Macduff, In re.....	[1896] 2 Ch. 451, 584, 587, 595, 610	
McFadden v. Brandon.....	6 O.L.R. 247.....	377
McGee v. Kane.....	14 O.R. 226.....	515
McGill v. Montreal Tramways Co.....	Q.R. 49 S.C. 326.....	395
McGillivray v. Township of Lochiel....	8 O.L.R. 446.....	381, 382, 388
McHugh v. Grand Trunk R.W. Co.....	2 O.L.R. 600.....	266, 268
Mackell v. Ottawa Separate School Trustees.....	32 O.L.R. 245, 18 D.L.R. 456, 12 O.W.N. 265.....	274, 276, 277
McKenzie v. McGlaughlin.....	8 O.R. 111.....	506
McKillop, Township of, v. Township of Logan.....	29 S.C.R. 702.....	381, 382, 387
McLaren v. Caldwell.....	29 Gr. 438.....	287, 288
McLaren v. Sudworth.....	4 U.C.L.J.O.S. 233.....	205
McLaughlin Automatic Air Brake Co. v. Allan.....	4 O.W.R. 67.....	528
McLay and Co. v. Perry and Co.....	44 L.T.R. 152.....	
 208, 209, 213, 215, 221	
McLellan and Township of Chingua-cousy, In re.....	27 A.R. 355.....	445

NAME OF CASE.	WHERE REPORTED.	PAGE
McLeod v. Lawson.....	8 O.W.R. 213, 335.....	506
McMurray v. Spicer.....	L.R. 5 Eq. 527.....	492
McNichol v. McPherson.....	15 O.L.R. 393.....	515
Maccomb v. Town of Welland.....	13 O.L.R. 335.....	38, 47, 60
Macpherson v. Scottish Rights of Way and Recreation Society.....	13 App. Cas. 744.....	70
McPherson v. Temiskaming Lumber Co. Limited.....	[1913] A.C. 145.....	205
Mader v. McKinnon.....	21 S.C.R. 645.....	204
Magnus v. National Bank of Scotland..	36 W. R. 602, 57 L. J. Ch. 902	310, 313
Maloof v. Bickell.....	13 O.W.N. 4.....	377
Mander v. Falcke.....	[1891] 3 Ch. 488.....	224
Mandley v. Township of Monck.....	1 O.W.N. 271.....	445, 446
Mann v. Brodie.....	10 App. Cas. 378.....	38, 60
Mant v. Collins.....	8 Q.B. 916 (note).....	510
Marshal v. Crutwell.....	L.R. 20 Eq. 328.....	435
Mason v. Langford.....	4 Times L.R. 407.....	20
Mason v. Seney.....	11 Gr. 447, 12 Gr. 143.....	566
Massey-Harris v. Smith.....	6 Terr. L.R. 50.....	378
Massie v. Toronto Printing Co.....	12 P.R. 12.....	203, 205, 206
Mathers v. Penfold.....	[1915] 1 K.B. 514.....	189
May v. Logie.....	23 A.R. 785.....	602
Mayer v. Grand Trunk R.W. Co.....	31 U.C.C.P. 248.....	260, 263
Mayne v. Grand Trunk R.W. Co.....	39 O.L.R. 1, 34 D.L.R. 644...	454, 456, 458
Mearns v. Central R.R. Co. of New Jersey.....	163 N.Y. 108.....	457
Mendels v. Gibson.....	7 O.L.R. 611.....	465
Mersey Docks Trustees v. Gibbs.....	L.R. 1 H.L. 93.....	423, 425
Metropolitan District R.W. Co. v. Earl's Court Limited.....	55 Sol. Jour. 807.....	152
Metropolitan Life Insurance Co. v. Mont- real Coal and Towing Co.....	35 S.C.R. 266.....	626
Mews v. Mews.....	15 Beav. 529.....	435
Midland R.W. Co. v. Robinson.....	15 App. Cas. 19.....	253
Millar v. Macdonald.....	14 P.R. 499.....	138
Millbourn v. Lyons.....	[1914] 2 Ch. 231.....	506
Milligan v. Jamieson.....	4 O.L.R. 650.....	510
Milligan v. Toronto R.W. Co.....	17 O.L.R. 530.....	615
Minnesota v. Northern Securities Co.....	184 U.S. 199.....	153
Minshall v. Lloyd.....	2 M. & W. 450.....	510
Mirrlees' Charity, In re.....	[1910] 1 Ch. 163.....	587
Mitchell v. Fidelity and Casualty Co. of New York.....	38 O.L.R. 543.....	287, 289
Mitchell v. Lee.....	L.R. 2 Q.B. 259.....	204, 205
Money v. Leach.....	3 Burr. 1742.....	425
Montreal Street R.W. Co. v. Normandin..	[1917] A.C. 170.....	349, 350
Moore, In re.....	[1901] 1 Ch. 936.....	584
Moran v. Place.....	[1896] P. 214.....	299, 300
Morgan v. Bain.....	L.R. 10 C.P. 15.....	78, 81
Morice v. Bishop of Durham.....	9 Ves. 399, 10 Ves. 522.....	595, 610
Morier v. St. Paul Minneapolis and Manitoba R.W. Co.....	47 Am. Rep. 793.....	416, 426
Morrall v. Sutton.....	1 Ph. 533.....	356
Morris (Herbert) Limited v. Saxelby....	[1916] 1 A.C. 688.....	240, 241, 243
Morton and City of St. Thomas, In re...	6 A.R. 323.....	39
Munro v. Standard Bank of Canada.....	30 O.L.R. 12, 16 D.L.R. 293..	246
Murray v. Dawson.....	17 U.C.C.P. 588.....	446
Murray v. Southern Pacific Co.....	236 Fed. Repr. 704.....	454, 458
Myles v. Noble.....	1 C.L.T. Occ. N. 214.....	437

NAME OF CASE.	N.	WHERE REPORTED.	PAGE
Nash v. DeFreville.....	[1900]	2 Q.B. 72.....	111
National Association of Operative Plas- terers v. Smithies.....	[1906]	A.C. 434.....	137
Neill v. Duke of Devonshire.....	8 App. Cas. 135.....	24, 40, 49, 67	67
New v. Bonaker.....	L.R. 4 Eq. 655.....		586
New England Iron Co. v. Gilbert (Metro- politan) Elevated R.R. Co.....	91 N.Y. 153.....		78
Newby v. Harrison.....	3 DeG. F. & J. 287.....		486
Newton, Ex p.....	24 L.J.N.S.C.P. 148, 16 C.B. 97.....		190
Nielsen, In re.....	131 U.S. 176.....		201
Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.....	[1894] A.C. 535.....		241
Norman v. Great Western R.W. Co.....	[1915] 1 K.B. 584.....		15
North v. Percival.....	[1898] 2 Ch. 128.....		489
North British R.W. Co. v. Budhill Coal and Sandstone Co.....	[1910] A.C. 116.....	252, 253, 255, 256, 258	
North Eastern R.W. Co. v. Wanless....	L.R. 7 H.L. 12.....		22
North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited.....	[1914] A.C. 461.....	240, 244	
Northcote v. Brunker.....	14 A.R. 364.....		364
Norton v. Yates.....	[1906] 1 K.B. 112.....		331
Nottage, In re.....	[1895] 2 Ch. 649.....		586

O.

O'Driscoll v. Manchester Insurance Com- mittee.....	[1915] 3 K.B. 499.....	322, 324, 329, 331, 333, 336	
Ogden, Re.....	25 Times L.R. 382.....		587
Ogilvie v. Foljambe.....	3 Mer. 53.....		489, 490
O'Hearn v. Town of Port Arthur.....	4 O.L.R. 209.....		615
Ommanney v. Butcher.....	24 R.R. 42, Turn. & Russ. 260.....		587
O'Neil v. Harper.....	28 O.L.R. 635, 10 D.L.R. 433, 13 D.L.R. 649.....	38, 69, 70	
Ontario Bank v. O'Reilly.....	12 O.L.R. 420.....		246, 249
Orrell Colliery and Fire-Brick Co., In re.	12 Ch. D. 681, 28 W.R. 145.....	310, 312, 313	
Osborne v. Kerr.....	17 U.C.R. 134.....	513, 515, 528	
Oswald v. Whitman.....	22 N.S.R. 13.....		505, 510
Overend Gurney & Co., In re, Ex p. Swan	L.R. 6 Eq. 344.....		107
Ovey, In re.....	29 Ch. D. 560.....		587
Owen v. Thomas.....	3 My. & K. 353.....		491
Oxenden v. Lord Compton.....	2 Ves. Jr. 69.....		367

P

Paginini v. North Jersey Street R.W. Co.	69 N.J. L.R. 60, 54 Atl. Repr. 218.....	454, 458	
Palk v. Shinner.....	18 Q.B. 568.....		40
Palmer v. Miller.....	13 O.R. 567.....		23
Papillon v. Brunton.....	5 H. & N. 518.....		633
Paquin Limited v. Beauclerk.....	[1906] A.C. 148.....		23
Paramour v. Yardley.....	Plowd. 539.....		356
Pardee v. Kanady.....	100 N.Y. 121.....		78
Parfitt v. Lawless.....	L.R. 2 P. & D. 462.....	560, 563	
Parks, Ex p.....	93 U.S. 18.....		199
Paterson v. Todd.....	24 U.C.R. 296.....	515, 528	
Patterson v. King.....	27 O.R. 56.....		206
Patterson v. Richmond.....	17 C.L.J. 324.....		206

NAME OF CASE.	WHERE REPORTED.	PAGE
Paxton v. Douglas.....	19 Ves. 225.....	137, 138
Pearson v. Spencer.....	1 B. & S. 571.....	73
Peerless, Ex p.....	1 Q.B. 143.....	198
People ex rel. Tweed v. Liscomb.....	60 N.Y. (15 Sickels) 559.....	201
Peters v. Sinclair.....	48 S.C.R. 57, 13 D.L.R. 468.....	38, 66
Phelps v. Lord.....	25 O.R. 259.....	569, 585, 605, 608
Phillips v. Low.....	[1892] 1 Ch. 47.....	39, 72, 73
Phillipson v. Kerry.....	32 Beav. 628.....	557
Philpot v. Bath.....	[1905] W.N. 114.....	510
Phoenix Bessemer Steel Co., In re.....	4 Ch. D. 108.....	78, 81, 82
Piper v. Piper.....	[1876] W.N. 202.....	222, 226
Plant v. Bourne.....	[1897] 2 Ch. 281.....	487, 490, 492
Polden v. Bastard.....	L.R. 1 Q.B. 156.....	73
Poncione v. Higgins.....	21 Times L.R. 11.....	475
Poole v. Huskinson.....	11 M. & W. 827.....	38, 52, 60
Poole's Case.....	1 Salk. 368.....	510
Porter v. Freudenberg.....	[1915] 1 K.B. 857.....	165, 167
Power v. Barham.....	4 A. & E. 473.....	216
Powerscourt v. Powerscourt.....	1 Molloy 616.....	585, 605, 608
Praed v. Graham.....	24 Q.B.D. 53.....	129
Praeger v. Bristol and Exeter R.W. Co.....	24 L.T.R. 105.....	454, 455
Prairie City Oil Co. v. Standard Mutual Insurance Co.....	44 S.C.R. 40.....	162
Prince v. Oriental Bank Corporation.....	3 App. Cas. 325.....	250
Proctor v. Sargent.....	2 M. & G. 20.....	241

Q.

Quirk v. Thomas.....	[1916] 1 K.B. 516.....	128, 129
----------------------	------------------------	----------

R.

Rainbow v. Juggins.....	5 Q.B.D. 422.....	368, 372
Raven, In re.....	84 L.J. Ch. 489.....	587
Reed v. Ellis.....	38 O.L.R. 123, 32 D.L.R. 592.....	414
Reed v. Jackson.....	1 East 355.....	40, 67
Reeve, In re.....	4 P.R. 27.....	390
Reeves v. Butcher.....	[1891] 2 Q.B. 509.....	377
Regina v. Arscott.....	9 O.R. 541.....	178, 180, 191, 195
Regina v. Boardman.....	30 U.C.R. 553.....	138
Regina v. Bolton.....	1 Q.B. 66.....	180, 271
Regina v. Cavanagh.....	1 Dowl. N.S. 546.....	187
Regina v. Chaney.....	6 Dowl. 281.....	198
Regina v. Clark.....	2 O.R. 523.....	197
Regina v. Erdheim.....	[1896] 2 Q.B. 260.....	143
Regina v. Fox.....	18 P.R. 343.....	138, 140, 142, 145
Regina v. Hart.....	20 O.R. 611.....	140, 145
Regina v. Hillam.....	12 Cox C.C. 174.....	143
Regina v. Hughes.....	4 Q.B.D. 614.....	272
Regina v. Lawrence.....	43 U.C.R. 164.....	140
Regina v. Lennox.....	34 U.C.R. 28.....	180
Regina v. Levecque.....	30 U.C.R. 509.....	180
Regina v. Millard.....	6 Cox C.C. 150.....	180
Regina v. Murdock.....	27 A.R. 443.....	180, 272
Regina v. Nasmith.....	42 U.C.R. 242.....	410
Regina v. Povey.....	Dears. C.C. 32.....	584
Regina v. Prince.....	L.R. 2 C.C.R. 154.....	497
Regina v. Roddy.....	41 U.C.R. 291.....	138, 140
Regina v. Savage.....	13 Cox C.C. 178.....	584
Reichel v. Magrath.....	14 App. Cas. 665.....	310
Rex v. Axler.....	40 O.L.R. 304.....	469, 472
Rex v. Barber.....	1 Strange 444.....	145
Rex v. Baugh.....	36 O.L.R. 436, 31 D.L.R. 66.....	39

NAME OF CASE.	WHERE REPORTED.	PAGE
Rex v. Bosak.....	10 O.W.N. 301, 26 Can. Crim. Cas. 374.....	181
Rex v. Brown.....	8 T.R. 26.....	187
Rex v. Cantin.....	39 O.L.R. 20.....	470, 474
Rex v. Chappus.....	39 O.L.R. 329.....	271, 470, 474
Rex v. Code.....	13 Can. Crim. Cas. 372.....	180
Rex v. Cook.....	18 O.L.R. 415.....	470, 474
Rex v. Fuller.....	1 Ld. Raym. 509.....	180
Rex v. Harris.....	13 Can. Crim. Cas. 393.....	176
Rex v. Hays.....	12 Can. Crim. Cas. 423, 14 O.L.R. 201.....	284
Rex v. Jackson.....	12 O.W.N. 77, 161.....	190
Rex v. Johnson.....	19 Can. Crim. Cas. 203, 1 D.L.R. 548.....	180
Rex v. Lamothe.....	18 O.L.R. 310.....	175, 180, 187, 191, 196, 197
Rex v. Leach.....	17 O.L.R. 643.....	181, 349, 350
Rex v. Le Clair.....	39 O.L.R. 436.....	349, 351, 469, 473
Rex v. Lewis.....	6 O.L.R. 132.....	568, 585, 593
Rex v. L'Heureux.....	14 Can. Crim. Cas. 100.....	180
Rex v. Lindsay.....	66 J.P. 505.....	584
Rex v. McCormack.....	7 Can. Crim. Cas. 135.....	180
Rex v. McDevitt.....	39 O.L.R. 138.....	349, 350
Rex v. McKenzie.....	12 Can. Crim. Cas. 435.....	181
Rex v. McMurrer, McMurrer v. Jenkins	18 Can. Crim. Cas. 385.....	284
Rex v. Meceklette.....	18 O.L.R. 408.....	361
Rex v. Morgan.....	11 D.L.R. 794.....	475
Rex v. Morn Hill Camp Commanding Officer.....	[1917] 1 K.B. 176.....	271
Rex v. Naguib.....	[1916] W.N. 427, [1917] 1 K.B. 359.....	584
Rex v. O'Connor.....	3 O.W.N. 840, 20 Can. Crim. Cas. 75, 3 D.L.R. 23.....	180
Rex v. Owens.....	Unreported.....	352, 354
Rex v. Pepper.....	15 Can. Crim. Cas. 314.....	176, 180
Rex v. Pfister.....	3 O.W.N. 440.....	361
Rex v. Regan.....	14 Can. Crim. Cas. 106.....	180
Rex v. Renaud.....	18 O.L.R. 420.....	470, 474
Rex v. St. Armand.....	25 Can. Crim. Cas. 103.....	180
Rex v. St. Pierre.....	4 O.L.R. 76.....	470, 474
Rex v. Suddis.....	1 East 306.....	200
Rex v. Sylvester.....	45 N.S.R. 525.....	361
Rex v. Thornton.....	9 West. W.R. 825, 30 D.L.R. 441.....	193
Rex v. Titchmarsh.....	32 O.L.R. 569, 22 D.L.R. 272.....	174, 182, 183, 188
Rex v. Toy Moon.....	19 Can. Crim. Cas. 33.....	181
Richardson (James) & Sons Limited v. Gilbertson.....	39 O.L.R. 423.....	377
Riddell, In re.....	20 Q.B.D. 512.....	313
Roberts, In re.....	19 Ch. D. 520.....	602
Robertson and Township of North Easthope, In re.....	15 O.R. 423.....	381
Ross v. Fox.....	13 Gr. 683.....	506
Ross v. Hunter.....	4 T.R. 33.....	110
Ross v. Hunter.....	7 S.C.R. 289.....	443, 447, 448
Rossiter v. Miller.....	3 App. Cas. 1124.....	493
Rowley v. Tottenham Urban District Council.....	[1914] A.C. 95.....	47
Royston, Re.....	18 Man. R. 539.....	180
Ruddy and Toronto Eastern R.W. Co., Re.....	7 O.W.N. 796.....	131
Ruddy v. Toronto Eastern R.W. Co.....	38 O.L.R. 556, 33 D.L.R. 193.....	131, 132
Ryan, Re.....	32 O.R. 224.....	430

NAME OF CASE.	S.	WHERE REPORTED.	PAGE
Sabeans v. Edwards.....	32 D.L.R.	569.....	513
Saint v. Pilley.....	L.R. 10 Ex.	137.....	510
St. Pancras Vestry v. Batterbury.....	2 C.B.N.S.	477.....	382
Saunderson v. Griffiths.....	5 B. & C.	909.....	87
Savory (E.W.) Limited v. The World of Golf Limited.....	[1914] 2 Ch.	566.....	492
Scammell v. Clarke.....	23 S.C.R.	307.....	510
Schwent v. Roetter.....	21 O.L.R.	112.....	430
Scott v. Scott.....	[1913] A.C.	417.....	284
Seymour v. Township of Maidstone.....	24 A.R.	370.....	443, 445, 448
Shardlow v. Cotterell.....	20 Ch. D.	90.....	489, 490, 492
Sharpe v. White.....	20 O.L.R.	575.....	289
Siebold, Ex p.....	100 U.S.	371.....	199, 201
Simmons and Dalton, Re.....	12 O.R.	505.....	626
Simonds v. Chesley.....	20 S.C.R.	174.....	510
Sims v. Doughty.....	5 Ves.	243.....	357
Sims & Co. v. Midland R.W. Co.....	[1913] 1 K.B.	103.....	338, 342
Sinclair v. Canadian Mutual Fire Insur- ance Co.....	40 U.C.R.	206.....	158, 164
Skeans v. Hampton.....	31 O.L.R.	424.....	241
Skilbeck v. Hilton.....	L.R. 2 Eq.	586.....	236
Skillings v. Royal Insurance Co.....	4 O.L.R.	123, 6 O.L.R.	401..
		619, 626, 629, 631, 633	
Slanning v. Style.....	3 P. Wms.	334.....	434
Slazengers Limited v. C. Gibbs and Co..	33 Times L.R.	35.....	113, 115
Smith v. City of Regina.....	34 D.L.R.	238.....	618
Smith v. Day.....	21 Ch. D.	421.....	483, 484, 486
Smith v. Hughes.....	L.R. 6 Q.B.	597.....	513
Smith v. Moody.....	[1903] 1 K.B.	56.....	180
Smith v. Woodfine.....	1 C.B.N.S.	660.....	119, 128
Smyth v. Smyth.....	8 Ch. D.	561.....	602
Sornberger v. Canadian Pacific R.W. Co.....	24 A.R.	263.....	113, 124
South Eastern R.W. Co. and Wiffin's Contract, In re.....	[1907] 2 Ch.	366.....	132, 134
Sparkes v. Younge.....	8 Ir. C.L.R.	251.....	323
Spencer, Re.....	54 L.T.R.	597.....	358
Sprunt v. Pugh.....	7 Ch. D.	567.....	223
Stack v. T. Eaton Co.....	4 O.L.R.	335.....	505, 511
Stansfield v. Mayor etc. of Portsmouth..	4 C.B.N.S.	120.....	510
Stapleton, Ex p.....	10 Ch. D.	586.....	78, 81
Steer v. St. James's Residential Cham- bers Co.....	3 Times L.R.	500.....	5, 18
Steggles v. New River Co.....	11 W.R.	234.....	460, 464
Stephenson v. Garnett.....	[1898] 1 Q.B.	677.....	310
Stevens v. Theatres Limited.....	[1903] 1 Ch.	857.....	540
Sticklehorne v. Hatchman.....	Owen 43.....		460, 464
Stimson v. Farnham.....	L.R. 7 Q.B.	175.....	524
Stocks, Re.....	11 O.W.N.	212.....	356
Stonehouse v. Walton.....	35 O.L.R.	485, 27 D.L.R.	662..
			236
Stott v. North Norfolk.....	16 D.L.R.	48.....	445
Stourcliffe Estates Co. Limited v. Bournemouth Corporation.....	[1910] 2 Ch.	12.....	131, 135
Stratheden, Lord, and Campbell, In re..	[1894] 3 Ch.	265.....	584, 586
Strickland, In re.....	L.R. 6 Ch.	226.....	367
Strong v. Crown Fire Insurance Co.....	3 O.W.N.	481, 1 D.L.R.	111..
Sutherland v. Murray.....	1 T.R.	538.....	425
Sutton v. Johnstone.....	1 T.R.	493.....	425
Swain, In re.....	[1905] 1 Ch.	669.....	588, 612
Swale v. Canadian Pacific R.W. Co.....	29 O.L.R.	634, 15 D.L.R.	816..
			260, 263
Sweeney v. DeGrace.....	42 N.B.R.	344.....	390
Symington v. Caledonian R.W. Co.....	[1912] A.C.	87.....	252, 253, 255, 257

T.	NAME OF CASE.	WHERE REPORTED.	PAGE
	Tancred Arrol & Co. v. Steel Co. of Scotland Limited.....	15 App. Cas. 125.....	213, 215
	Tapp v. Jones.....	L.R. 10 Q.B. 591.....	204
	Taylor v. New South Wales Bank.....	11 App. Cas. 596.....	368, 370
	Taylor v. Scott.....	30 O.R. 475.....	193
	Taylor v. Yeandle.....	27 O.L.R. 531, 8 D.L.R. 733.....	561, 564
	Tebbitts Brothers v. Smith.....	33 Times L.R. 260, 508, [1917] W.N. 130, 241.....	208, 210, 213, 221
	Thairlwall v. Great Northern R.W. Co..	[1910] 2 K.B. 509.....	627
	Thomson v. Eastwood.....	2 App. Cas. 215.....	236
	Thomson v. Shakespear.....	1 De G. F. & J. 309.....	586
	Thorne v. Cann.....	[1895] A.C. 11.....	373
	Thorne v. Heard & Marsh.....	[1895] A.C. 495.....	239
	Thornton v. Howe.....	31 Beav. 14.....	568, 576, 584, 588, 593
	Timothy v. Simpson.....	6 C. & P. 499.....	11
	Toronto, City of, v. Morson.....	37 O.L.R. 369.....	228, 232
	Toronto, City of, v. Toronto R.W. Co..	39 O.L.R. 310.....	279
	Toronto Cream and Butter Co. Limited v. Crown Bank.....	16 O.L.R. 400.....	246, 249
	Toronto Power Co. Limited v. Paskwan..	[1915] A.C. 734, 22 D.L.R. 340.....	17, 21
	Toronto R.W. Co. v. King.....	[1908] A.C. 260.....	24, 450, 460
	Toronto R.W. Co. v. Toronto Corporation	[1906] A.C. 117.....	465, 466
	Townsend v. Northern Crown Bank....	27 O.L.R. 479, 10 D.L.R. 149, 49 S.C.R. 394.....	246, 250
	Trimble v. Hill.....	5 App. Cas. 342.....	206
	Trusts and Guarantee Co. v. Hart.....	32 S.C.R. 553.....	556
	Turner v. Doe d. Bennett.....	9 M. & W. 643.....	437
	Turner v. Walsh.....	6 App. Cas. 636.....	39
	Turtle v. Township of Euphemia.....	31 O.R. 404.....	381
	Tyriell v. Painton.....	[1894] P. 151.....	565, 566

U.

Union Bank of Canada v. Makepeace...	12 O.W.N. 397.....	369
United States Mortgage and Trust Co. v. Central San Cristobal Inc.....	7 Porto Rico Fed. Reps. 693..	348
United Telephone Co. v. Dale.....	25 Ch. D. 778.....	279
University of London Medical Sciences Institute Fund, In re.....	[1909] 2 Ch. 1.....	569, 587, 606
Upper Canada College v. City of Toronto	37 O.L.R. 665.....	485

V.

Vézina v. The Queen.....	17 S.C.R. 1.....	253
Victorian Daylesford Syndicate Limited v. Dott.....	[1905] 2 Ch. 624.....	475

W.

Wakefield Corporation v. Cooke.....	[1904] A.C. 31.....	40
Waldron v. Jacob and Millie.....	5 Ir. R. Eq. 131.....	491
Walker v. Midland R.W. Co.....	2 Times L.R. 450.....	4
Walker v. Smith.....	29 Beav. 394.....	564
Wallis v. Solicitor-General for New Zealand.....	[1903] A.C. 173.....	585, 588
Ward v. Benson.....	2 O.L.R. 366.....	299, 300
Watson v. Jackson.....	31 O.L.R. 481.....	40, 71
Watt v. Watt.....	[1905] A.C. 115.....	24

NAME OF CASE.	WHERE REPORTED.	PAGE
Webb v. Stenton.....	11 Q.B.D. 518.....	324, 331
Weese v. Weese.....	37 O.L.R. 649.....	430
Weir v. Crum-Brown.....	[1908] A.C. 162.....	610
Weiser v. Heintzman No. 2.....	15 P.R. 407.....	138, 139, 145
Weston (George) Limited v. Baird.....	37 O.L.R. 514, 31 D.L.R. 730.....	241, 243
Whicker v. Hume.....	14 Beav. 509.....	585
Whitbread, Ex p.....	2 Mer. 99.....	367
White, In re.....	85 L.J. Ch. 368.....	587
Whiteman v. Sadler.....	[1910] A.C. 514.....	475
Whittaker, Ex p.....	L.R. 10 Ch. 446.....	81
Williams v. Kershaw.....	56 Cl. & F. 111.....	610
Williams v. Williams.....	42 R.R. 269, 5 L.J.N.S. Ch. 84.....	587
Wilson, In re.....	[1913] 1 Ch. 314.....	584, 587, 606
Wilson, Re.....	30 O.R. 553.....	584
Wilson v. Church.....	9 Ch. D. 552.....	152
Wilton & Co. v. Osborn.....	[1901] 2 K.B. 110.....	475
Wolfe v. Lowther.....	31 Times L.R. 354.....	479
Wood, In re.....	[1894] 3 Ch. 381.....	586
Wood v. Copper Miners' Co.....	14 C.B. 428.....	209, 213
Wood v. Haines.....	38 O.L.R. 583, 33 D.L.R. 166.....	95
Wood v. Hewett.....	8 Q.B. 913.....	510
Wood v. Manley.....	11 A. & E. 34.....	11
Woodman v. Blair.....	30 U.C.C.P. 452.....	113, 129
Wright v. Carter.....	[1903] 1 Ch. 27.....	560
Wyatt v. Palmer.....	[1899] 2 Q.B. 106.....	316
Wycott v. Hartman.....	14 Gr. 219.....	557
Wynne v. Tempest.....	[1897] 1 Ch. 110.....	345

X.

X.Y., In re.....	[1902] 1 K.B. 98.....	142
------------------	-----------------------	-----

Y.

York v. Township of Osgoode.....	24 O.R. 12.....	382
Young, In re.....	28 Ch. D. 705.....	430

Z.

Zeagman, Re.....	37 O.L.R. 536.....	587
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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

STRUTHERS V. BURROW.

1917

March 5.
June 8.

*Negligence—Unsafe Premises—Injury to Person Going there on Lawful Business
—Invitation—Leave—Evidence—Cause of Action—Findings of Jury.*

The plaintiff came with a waggon to the defendants' factory to get a pair of scales which he had ordered. In the archway leading from the highway to the factory, a notice was displayed: "Positively no admittance to the factory; apply at office." The plaintiff said that he did not see the notice; he, however, went to the office, and was there directed by a person in charge to drive into the yard and go to the platform in front of the shipping-room, where the scales would be brought out; he drove into the yard, but not up to the platform; after waiting for some time, no one appearing with the scales, he essayed to go upon the platform with the object of entering the shipping-room, the door of which, giving upon the platform, was open. There were no regular steps by which to ascend the platform, but some loose blocks had been placed so as to afford a means of mounting; the plaintiff stepped upon these, they gave way, he fell, and was injured. In an action brought to recover damages for the injury, the jury found that there was negligence on the part of the defendants "for not having proper steps or no steps at all;" that the cause of the plaintiff's injury was his fall on the defendants' premises; that there was an invitation to him to use the blocks, "being as there was no other way to get upon the platform;" that the purpose of the invitation was to receive goods ordered; they also found against contributory negligence, and declared that the plaintiff was "justified in doing as he did do:"—

Held (MAGEE, J.A., and LENNOX, J., dissenting), that the plaintiff had failed to prove any cause of action; there was no evidence to support the jury's findings, and the action must be dismissed.

Judgment of KELLY, J., reversed.

Per MEREDITH, C.J.C.P.:—The plaintiff's right to recover did not depend upon an invitation; mere leave would be sufficient, in certain circumstances, to support the action; but the plaintiff had no leave to go upon the platform or to enter the factory; the defendants owed him no legal duty in that respect; there was no evidence upon which reasonable men could find that the plaintiff had the leave of the defendants to mount the platform.

Per RIDDELL and ROSE, JJ.:—It was not necessary to consider whether the jury could reasonably find—and *semble* they could not so find—that there was an invitation for any purpose. The jury found that the invitation was to use the blocks to receive goods. The plaintiff was not using the blocks for any such purpose, but to mount the platform in order to trespass upon the defendants' factory. According to the jury, he was invited to mount the platform if and when he was to receive goods, and that time had not come.

1917
 STRUTHERS
 v.
 BURROW.

Per MAGEE, J.A., and LENNOX, J.:—There was evidence to go to the jury upon which they might reasonably find that the plaintiff was, when using the steps or blocks, an "invitee," within the meaning of that expression as used by the Courts; and the findings of the jury could not be set aside.

Review of the authorities.

AN action for damages for injury sustained by the plaintiff while on the premises of the defendants.

The action was tried by KELLY, J., and a jury, at Hamilton. *S. F. Washington*, K. C., for the plaintiff.

George Lynch-Staunton, K.C., and *E. F. Lazier*, for the defendants.

March 5. KELLY, J.:—In answer to the questions submitted to them, the jury have found: that there was negligence on the part of the defendants "for not having proper steps or no steps at all;" that the cause of the plaintiff's injuries was the fall which he received on the defendants' property; that there was an invitation by the defendants to the plaintiff to use the steps or blocks referred to, "being as there was no other means to get upon the platform;" and that the purpose for which the invitation was given was "to receive goods which was ordered." They also found against contributory negligence, and declared that the plaintiff "was justified in doing as he did do."

The submission of the defendants is, that these findings do not shew a breach of any duty that the defendants owed to the plaintiff; and, amongst other things, on the question of invitation, they contend that there was no evidence that the plaintiff was told to use the blocks where he met with the injury.

Going to the defendants' premises on business in which both he and the defendants were concerned—to take delivery of a scales which he had purchased from them—he entered the defendants' office. According to the evidence of the defendants' clerk, there was then and had been for a long time hanging in the archway leading from Cannon street into the premises, this notice: "Positively no admittance to the factory; apply at office." The plaintiff says he never saw this notice, and that his attention was not drawn to it; but there is evidence that he proceeded to the office, and was there directed by a person in charge where to drive into the premises, and was told to go to the platform at the

door of the shipping-room, where the scales would be brought out; and, having done so and having waited for about ten minutes, and no one appearing with the scales, he proceeded to go upon the platform with the object of entering the shipping-room, and when he was going up what he called "the steps" to the platform they gave way, and he fell and was injured.

It is also in evidence that teamsters had been going in over this platform for years and had been helping the defendants' employees to load goods from it. There is some evidence from which it could be inferred that the platform and the door leading from it into the shipping-room were in general use by those having occasion to go there for purposes such as brought the plaintiff.

The defendants also contend that there is no evidence to support the jury's finding that there was an invitation by the defendants to the plaintiff to use the steps or blocks, and that the invitation which he did receive did not extend to his going on to the platform or into the shipping-room. When the purpose for which he was invited upon the premises is kept in mind, and the evidence of what happened as to what it was necessary for him to do to attain that purpose, there was, it seems to me, sufficient to warrant the inference by the jury that the plaintiff was within his rights in going upon the platform by way of the steps or blocks. In addition to this, there is the evidence of the defendants' clerk, who has been in their employ for more than twenty years, that he thought the blocks from which the plaintiff fell were there for the purpose that the plaintiff used them. This witness also says that at times he saw blocks there, and at other times he saw boxes in the same place, but he does not know if he noticed the blocks until recently.

On a review of the whole matter, bearing in mind the reason why the plaintiff was on the defendants' premises, I am of opinion that there was evidence on which the jury could find that he was there on the defendants' invitation, and that that invitation was not limited so as to exclude his going on the platform, but extended to his using the steps or blocks as a means of access to the platform.

That being so, the only other matter for consideration is, whether the defendants were wanting in their duty to keep this means of access in proper condition. The plaintiff was on the

Kelly, J.

1917

STRUTHERS
v.
BURROW.

Kelly, J.

1917

STRUTHERS

v.

BURROW.

premises, not on a bare permission, but on lawful business in the course of fulfilling a contract in which both he and the defendants had an interest. All these circumstances go to distinguish this case from some of the authorities submitted by the defendants.

The duty of the occupier of premises on which the invitee enters is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or, in other words, to have the premises reasonably safe for the use that is to be made of them: Halsbury's Laws of England, vol. 21, para. 656; *Indermaur v. Dames* (1866), L.R. 1 C.P. 274. It would be difficult to say that in the present instance the defendants were not aware, or that they should not have been aware, of the existence of the blocks or their condition. To my mind there was, on this question as well, evidence to support the jury's finding.

Judgment will be in favour of the plaintiff with costs.

The defendants appealed from the judgment of KELLY, J.

May 10. The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J. A., RIDDELL, LENNOX, and ROSE, JJ.

George Lynch-Staunton, K.C., and *E. F. Lazier*, for the appellants, argued that there had been no invitation on the part of the defendants to the plaintiff to go upon the platform, and no leave or license, and consequently the defendants owed no duty to the plaintiff, and could not be guilty of negligence: *Jenkins v. Great Western Railway*, [1912] 1 K.B. 525; *Walker v. Midland R. W. Co.* (1885), 2 Times L.R. 450; *Dobson v. Horsley*, [1915] 1 K.B. 634. An invitation to go to the platform was not an invitation to go on the platform.

S. F. Washington, K.C., and *J. G. Gauld*, K.C., for the plaintiff, respondent, contended that there was an invitation, express or implied, to go upon the platform. The defendants would limit the invitation too much—it extended to going on the platform, if necessary, as here it had been. The open door was itself an invitation to come inside. Being an invitee, the plaintiff was entitled to find the premises reasonably safe for the purpose for which he went there, and the defendants owed the plaintiff the duty to keep them so safe. This they had not done, and con-

sequently were liable. Upon the duty which an occupier of premises owes to an invitee, counsel referred to *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311; *Steer v. St. James's Residential Chambers Co.* (1887), 3 Times L.R. 500; *Butts v. Goddard* (1887), 4 Times L.R. 193; *Holmes v. North Eastern R.W. Co.* (1869-71), L.R. 4 Ex. 254, L.R. 6 Ex. 123; *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398; an article in 32 Law Quarterly Review, p. 255.

App. Div.
1917
STRUTHERS
v.
BURROW

Lynch-Staunton, in reply, on the question of leave and license, referred to *Bilton v. Mackenzie* (1914), 31 O.L.R. 585.

June 8. MEREDITH, C.J.C.P.:—If the plaintiff's right, to recover damages from the defendants in this action, depended upon an actual invitation from the defendants to him to do that which he was doing at the time when he fell and injured himself, his case would be hopeless: actual invitation should not be confused with leave, or even desire, however great; one may be willing, indeed may be intensely anxious, that another may come to him, and yet be further from giving an invitation to do so than if his feelings were quite the opposite. Bearing in mind what an actual invitation is, no rational person could conscientiously say that the plaintiff was invited by the defendants to do that which I have mentioned; that the defendants really asked the plaintiff to mount their shipping platform No. 2, by means of the loose blocks of wood which, in a measure, caused his downfall; or indeed that they really asked him to mount that platform at all.

But the plaintiff's right so to recover does not depend upon such an invitation; the mere leave of the defendants may under certain circumstances be quite enough to support such an action as this; and it is not, and never was, needful to invent clumsy words, or to give to ordinary words a meaning which, properly, they do not bear, in order to support a right of action, or to deal with it conveniently and effectively.

The plaintiff can retain the judgment which he has recovered in this action, only: (1) if the defendants owed to him some legal duty; (2) which they neglected; (3) thereby causing him the injury in respect of which he has been awarded damages.

Then what duty did the defendants owe to the plaintiff? The jury apparently thought that it was the duty of the de-

App. Div.
1917

STRUTHERS
v.

BURROW.

Meredith,
C.J.C.P.

fendants to have proper steps from the ground to the top of their platform No. 2, or else to have "no steps at all." But it was a false assumption on the part of the jury as to having proper steps, a false assumption of a legal duty. There was no obligation of any kind to have steps of any character in connection with the platform. The defendants were entirely within their rights in building the platform as they did, without any steps or other means of getting upon it from the ground; and in building it as they did they made it plain, self-evident to every one, that it was not to be mounted in that way, or used as a means of entering their factory by any one on foot in the yard. And it was an assumption of a fact, without any finding upon it, and without any evidence upon which it could be found by any one, that the defendants had improper, or any kind of, steps for the purposes of doing, or permitting, that which the construction of the platform plainly shewed, as I have said, they intended should not be done. And all this is accentuated by the fact that the near-by platform, No. 1, was constructed with steps which no one has suggested were, in any sense, not proper and convenient, or which, in any sense, failed to provide ample means for that which was the self-evident purpose of steps—to afford those on foot in the yard, who had the right to use them, ample means of mounting that platform.

If the jury were charged, as they should have been, that, in law, the defendants might have steps or no steps, and, if steps, proper or improper ones, just as they saw fit, and that, no matter how insufficient the steps might be, the defendants would not be answerable in damages to any one injured in making use of them without the defendants' leave; if they were so charged, they must have disregarded that charge and deemed themselves makers, or expounders, of the law, as they must have done also in saying that the plaintiff was *justified* in doing as he did, in answer to the question: Could he, exercising reasonable care, have avoided his injury?

The plaintiff was upon the defendants' land by their leave and for the purpose of transacting business with them in a matter in which each had a money interest; and in such a case it is the duty of the occupier of the land to take reasonable care that the other person is not injured through anything of an unusually

dangerous nature, upon the land, of which the owner is, or ought to be, aware: but that must of course be limited to such part of the land as the other person has leave to be upon.

So that the main question is that to which counsel rightly confined, or at least towards which mainly they directed, their arguments: Had the plaintiff leave from the defendants to mount platform No. 2 in the way he was attempting to mount it when injured?

The jury have not found that he had; they were not asked in form so to find. They were asked whether the plaintiff was invited by the defendants to use the blocks in using which he fell; and, as that meant to mount in the way he was attempting, an affirmative answer to such a question would have been more, in the plaintiff's favour, than an affirmative answer to the question: had he leave?

Their answer was: "Being as there was no other means to get upon the platform, answer, yes." But that did not answer the question: it is really but in other words saying, "We find that he was justified in doing as he did do:" and that again really amounts to this: that we, the jury, exercising our own judgment in the whole matter, find that the plaintiff did no more than we think he should have had a right to do.

But, however the uncertain words of the jury may be looked at, if there be no evidence upon which reasonable men could find that the plaintiff had the leave of the defendants to mount the platform, there is an end to the plaintiff's claim. And of such leave I am unable to find any kind of evidence, whilst there is a good deal to the contrary.

What evidence, of any kind, is there of such leave, not to mention invitation?

As to any expressed leave, the evidence is altogether against the plaintiff.

The defendants' mind upon the subject was spoken in no uncertain words:—(1) In their conspicuous notice posted in the entrance to their yard, which notice the plaintiff and his wife passed by in driving into the yard, but which, he has testified, he did not see. The words are: "Positively no admittance to factory. Apply at office." Whether the plaintiff, or his wife, saw, or did not see, it does not at all detract from its effect as

App. Div.
1917

STRUTHERS
v
BURROW.

Meredith,
C.J.C.P.

App. Div.
1917

STRUTHERS
v.

BURROW.

Meredith,
C.J.C.P.

the continuous expression of the mind of the defendants on the subject:—(2) The immediate and direct expression of the mind of the defendants, through their servant to whom the plaintiff was sent and went, upon his business with the defendants, at the very time in question, is related by the plaintiff himself in these words: "He pointed out into the yard and asked: 'Do you see that building? Go around that building, and the scales will be there.'"

"Q. The man told you to go around to that platform, and they would bring the scales out there? A. Yes.

"Q. You went out and waited at the platform, expecting somebody to appear with these scales and put them on your waggon? A. I did.

"Q. That was the information you had as to what would happen up to that time? A. Yes. I was told to go there, and I stayed where I was told to go. I was told to *go and wait there for the scales.*"

The plaintiff's business there was to receive, take away, and pay for heavy weighing scales which he had purchased from the defendants: and, it need hardly be added, he was not on foot, he was driving, with his wife, in what is called a "double waggon," that is, a two-horsed waggon.

The means of delivering such heavy goods as these scales was the same at the defendants' factory as elsewhere: the goods are brought down from upstairs by means of a lift or "elevator," as it is commonly called: and, upon a truck, run out upon the delivery platform, and thence directly into the waggon or lorry which was drawn in alongside or was backed up to the platform to receive them; all this was done by the defendants' servants alone; then the man in charge of the waggon or lorry directed, if he desired to do so, where the goods were to be placed on the waggon or lorry, and the truck was run so as to bring the goods to the proper spot, the truck was slipped out and run back to the factory, thus completing the operation of loading. No part of the operation required the presence of the driver of the waggon or lorry, or any one with him, at any time, upon the platform; they had no business there. This is all made clear by the evidence adduced at the trial: and there is nothing to the contrary testified to by any one.

The plaintiff, having received the directions which I have read from his testimony at the trial, went back to his waggon, and, with his wife, drove into the defendants' yard. There were three other "teams" ahead of them, and they were obliged to follow them and take their turn in being attended to. The plaintiff saw at least one of these waggons loaded at the platform in question. When they had all gone on, instead of bringing his waggon up to the platform to be loaded, he let it remain some distance behind in charge of his wife, he himself having dismounted and being upon the ground. It is difficult to understand why he did not back his waggon into the platform and so let it be known that he was ready for his load. One can hardly imagine a surer way of securing prompt attention. But little, really, may depend upon that.

After waiting in the cold for a length of time, which he and his wife estimate at 10 or 15 minutes, he proceeded to mount the platform by means of several blocks of wood about 3 feet in length and 8 inches in width, and the same in depth, which some one had placed at one end of the platform for that purpose. His purpose was to enter the factory, by means of the platform, and hasten the delivery, in the way I have mentioned, of his scales; though, as I have said, his waggon was not yet at the platform to receive them.

In getting up, by means of these blocks of wood, he slipped upon one in such a manner that it "tipped up," and consequently he fell, and was hurt, but not enough to prevent him from carrying out his business with the defendants. He backed his waggon into the platform; the defendants' servants put the scales upon it: he went to the office and paid for them, and then drove home with them.

It is quite obvious that the plaintiff had no expressed leave to enter the factory as he intended: nor to go upon the platform for any purpose: as I have said, all that was expressed upon the subject was to the contrary.

Nor is there any evidence from which it can be implied that such leave was given: there is no circumstantial evidence of it: the circumstances prove only the contrary also.

Let me refer to some of them: (1) the construction of the platform, 3 to 3½ feet in height, without any steps; (2)

App. Div.
1917

STRUTHERS
v.
BURROW.

Meredith,
C.J.C.P.

App. Div.
1917

STRUTHERS
v.

BURROW.

Meredith,
C.J.C.P.

its purpose, loading heavy goods on waggons and such like means of conveyance, only; (3) the temporary and make-shift character of the means of ascending; and (4) the entire absence of any evidence that any customer, teamster, or other person receiving goods there, ever used this means of getting upon the platform on any occasion.

It is no evidence of such leave that some persons, probably servants of the defendants, had long improvised means of getting from the ground upon the platform, using old boxes, blocks of wood, and "other rubbish," for the purpose: there being no evidence of a single instance of any one receiving goods there, having used such means. And, when there is no evidence of the thing ever having been done, how can there be evidence that it was done to such an extent, with the defendants' knowledge, that they can be found to have permitted it? Or why should any one suppose that a driver of a team of horses would dismount and take such means of getting upon the platform as these boxes, rubbish, or blocks of wood afforded, even if he had a right to go there?

No case that I am aware of gives any encouragement to the plaintiff's claim: the strongest of them in a plaintiff's favour, seems to me to shew how far short of any proof of liability on the part of the defendants, in this case, the plaintiff has come. In *Lowery v. Walker*, [1911] A.C. 10, the public had, to the knowledge of the defendant, habitually used a way across his field in going to a railway station; and he had, without prohibiting it, let loose, in the field, a horse, which is described as a dangerous animal with savage propensities, without giving any warning of the danger he thus knowingly and actively created.

We must not follow in the footsteps of the jury and give to litigants as their lawful rights that which we may think would be reasonable instead of that which we know, or ought to know, is the law applicable to their case.

And, if we could adjudge according to our individual notions of what is reasonable and fair, I should be quite unable to say that the plaintiff had any right to enter the defendants' factory as he was endeavouring to do when he fell and was hurt. One man may have a right to enter upon the property of another against the will of the other when he has contracted for such right,

as the defendant, in the case of *Wood v. Manley* (1839), 11 A. & E. 34, had. But business, no matter how important or urgent, is no justification for intrusion upon the property of another: *Timothy v. Simpson* (1834), 6 C. & P. 499. Every man is master in his own house: and may be as unreasonable as he pleases in regard to those who may come or be there.

App. Div.
1917
STRUTHERS
v.
BURROW.
Meredith,
C.J.C.P.

Why should the defendants give leave to any one, coming, as the plaintiff was, to take away goods, to enter the factory? It could not be necessary in the interests of either. If the plaintiff had complaint, or demand, to make, the place to make it was at the office, and the person to whom it should be made was some one in authority: there was no such person to be expected, nor any one in fact, as far as the evidence shews, in that part of the factory that the plaintiff intended to enter. What could he do there? He had no right to command the defendants' servants there, or to interfere with the orders of their masters. What right had he to do anything there? And he knew that the man who was in charge of the matter, and to whom he had spoken, was not there, but was upstairs over the door into the building from the platform with the steps—platform No. 1.

It would be so much against the defendants' interest to admit any persons, such as the plaintiff, to their factory, that it should be generally known, as their warning stated, that no such admission was permitted. There is always more or less danger in such a place, and the more to those unfamiliar with it and its dangers. Why should either party risk that needlessly, and especially the defendants? Why permit that which would be likely to distract the attention of their workmen, and waste their time in gossip? Everything points against the possibility even of leave being given to enter the factory for any purpose, and more so against entering it by means of boxes, rubbish, or blocks of wood which no one in his senses could have imagined were stairs intended by the owners of the building to be used by customers.

The case seems to me to be a very plain one of failure to prove any cause of action; and a case in which that might be shewn in a few words; but I have chosen to say a good many because of the need to curb any disposition on the part of jury or Judge to deter-

App. Div.
1917

STRUTHERS
v.

BURROW.

Riddell, J.

mine rights of property according to their notions merely of what is "justifiable" or right.

I would allow the appeal and dismiss the action.

RIDDELL, J.:—The plaintiff, a miller at Waterdown, bought from the defendants a pair of scales. Receiving notice that these were ready for him, he went with his waggon to the defendants' factory for them. He went into the defendants' office, and was referred to an employee upstairs: going upstairs and finding that person, he was told: "Do you see that building? Go around that building, and the scales will be there"—"to go and wait there for the scales"—"to go around to that platform and they would bring the scales out there."

He drove around and saw a delivery or "loading" platform; but, as there were several rigs ahead of him (which were having things loaded on them) he stopped his waggon some twenty feet away from the platform, got out on the ground and waited. After the last waggon ahead of him went away, he waited some ten or fifteen minutes for his scales to be brought out: it was cold, and the plaintiff got tired of waiting. He accordingly made up his mind to get up on the platform, go into the factory by the open door, and see what caused the delay.

The platform was only about four feet wide—it had no steps leading up to it, although a neighbouring platform had—there were, however, a few blocks of wood, some 3 feet long and 8 x 8 inches, lying loosely at one end of the platform, which apparently had been used by some one to mount the platform. The plaintiff tried to get on the platform by these blocks, "toppled over," and was rather seriously injured.

He brought an action which was tried at Hamilton before Mr. Justice Kelly and a jury—the jury gave answers to questions as follows:—

1. Was the injury to the plaintiff the result of negligence, or did it arise from mere accident? A. We, the jury, find negligence on part of company for not having proper steps or no steps at all.

2. If it arose through negligence, was there negligence on the part of the defendants which caused the injury? A. Yes.

3. If there was such negligence on defendants' part, state

fully and clearly what were the acts or omissions of theirs which caused the injury? A. We, the jury, find that the cause of injury is in the fall which plaintiff received on defendants' property.

4. Even if there was negligence by the defendants, could the plaintiff, by the exercise of reasonable care, have avoided the injury? A. No.

5. If so, state fully what he should not have done, or what he did not do that he should have done, to avoid the happening? A. We, the jury, find that he was justified in doing as he did do.

6. Was there any invitation by defendants to plaintiff to use the steps or blocks referred to? A. Being as there was no other means to get upon platform, answer, yes.

7. If there was such an invitation, for what purpose was such invitation given? A. To receive goods which was ordered.

8. If on your answers to the above questions the Court should be of opinion that plaintiff is entitled to damages, what amount of damages do you assess? A. We, the jury, agree to pay plaintiff six hundred dollars.

The failure of the jury to give a proper answer to question 3 may be considered healed by the answer to question 6—if there was an invitation to the plaintiff to use the blocks it is plain that the defendants are liable.

It is not necessary, in the view I take of the case, to consider whether the jury could reasonably find that there was an invitation for any purpose—I think they could not, but do not place my judgment on that ground.

The jury have found that the invitation was to use the blocks “to receive goods which was ordered” (We must not hold a jury to grammar, a jury like a King is *super grammaticam*.) The plaintiff was not using the blocks for any such purpose, but to mount the platform in order to trespass upon the defendants' factory.

He was invited to mount the platform (according to the jury) if and when he was “to receive goods:” that time had not come. By the instructions he received he was to wait and the goods would be brought out on the platform—even if the jury is right, then and then only the invitation was effective.

I would allow the appeal and dismiss the action, both with costs.

App. Div.
1917

STRUTHERS
v.

BURROW.

Riddell, J.

App. Div.
1917

ROSE, J., agreed with RIDDELL, J.

STRUTHERS
v.

BURROW.

Lennox, J.

LENNOX, J. (dissenting):—The defendants manufacture and sell weigh-scales and other merchandise in the city of Hamilton. The facts in detail are sufficiently referred to by the learned trial Judge and other members of this Court. It is sufficient for the purposes of my judgment to summarise the result of the evidence by saying that the plaintiff, at the time of the happening of the injuries complained of, was upon the defendants' premises to enable the defendants to complete, and to complete upon his part, a contract for the sale by the defendants and purchase by the plaintiff of a set of scales; and was there pursuant to a notice in writing mailed by the defendants to the plaintiff.

[The learned Judge then set out the findings of the jury, as above.]

Upon these findings judgment has been entered for the plaintiff for \$600, and the defendants appeal.

I have had the advantage of reading the judgments of the Chief Justice and of my brother Riddell, concurred in by my brother Rose. With deep consciousness of my comparatively limited experience, with profound respect, and with regret, I find myself quite unable to agree that the judgment entered should be set aside, or, if it should be, that the action should be now dismissed.

The case was left to the jury upon the questions and in the way the defendants' counsel desired, if left to the jury at all. They have found that the plaintiff could not, "by the exercise of reasonable care, have avoided the injury," and, with their attention repeatedly and pointedly called to the question of "invitation," have specifically found that there was an invitation by the defendants to use the steps for the purpose of receiving the scales.

With singular sagacity, the defendants' counsel, both here and in the Court below, forced to the front the question of "invitation" as if the proof of this were an indispensable condition precedent to fixing the defendants ultimately with liability. I am of opinion that this was not necessarily the ultimate determining factor, upon the evidence at the trial; and that, if the steps were something in the nature of an undisclosed danger or

"trap"—and no reasonable jury could think otherwise—there was something else that the jury might have been asked: upon the footing of the rights of "a bare license." However, it is not necessary to pursue this line. The Judge's charge is not objected to, and neither upon the charge nor the form of the question have the defendants ground for appeal. The appellants, however, raise a straight issue, and submit that there was no evidence to support the finding of invitation. This is the main point, and, if well-founded, it is sufficient to entitle the defendants to have the judgment set aside; but there are other points also taken, although much less vigorously pressed—for instance, that the answers are vague and inconclusive, that the steps were not maintained by the defendants, etc.

If there was *no evidence* upon which twelve reasonable men *could* answer questions 6 and 7 as they are answered, then, taking the action as it was in fact tried out—though possibly not as it might have been—it is clear enough that the judgment cannot stand: and it is perhaps superfluous to repeat, what is almost a daily declaration, that if there was reasonable evidence, direct or inferential, we are not at liberty to disturb the findings of the jury merely because we feel that upon the evidence we would or might have come to a different conclusion of fact.

The judgment of the Court of Appeal in *Norman v. Great Western R. W. Co.*, [1915] 1 K.B. 584, is important as containing a recent re-indorsement of the doctrine of *Indermaur v. Dames*, L.R. 1 C.P. 274—in the Exchequer Chamber, L.R. 2 C.P. 311—and in declaring the principle that the duty of railway companies, and other companies exercising statutory privileges or duties, towards persons resorting to their stations, yards, or premises, in the course of business, is the same as the duty of the occupiers of private premises towards persons coming to their premises in the course of business: and consequently the principles upon which all this line of cases has been decided may be invoked. Lord Justice Buckley, at pp. 591, 592, said: "The liability of a person upon whose land another comes towards the latter in respect of not exposing him to danger may be stated in an ascending scale. The liability is lowest towards a trespasser . . . The next is the case of a licensee . . . Next in the ascending scale is the invitee. The illustration commonly given is that of a shop-

App. Div.
1917
STRUTHERS
v.
BURROW.
Lennox, J.

App. Div.
1917

STRUTHERS
v.

BURROW.

Lennox, J.

keeper who tacitly invites persons to come into his shop and do business with him. The duty of the invitor towards the invitee is stated by Willes, J., in *Indermaur v. Dames* in language which was affirmed in the Exchequer Chamber, and which has been repeatedly cited in subsequent cases as being a correct statement of the law. The statement is this: 'And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, *must be determined by the jury as a matter of fact.*' " The italics are mine.

This covers the whole field. The jury have found that the plaintiff used reasonable care and acted as a reasonable man would act in the circumstances, was "justified in doing as he did do;" and I entirely agree in these conclusions; that the plaintiff had a right to expect and rely upon it that the defendants would take reasonable care against injuries from unusual and dangerous conditions; and that the character and condition of the steps presented an unusual danger, of which the defendants were or ought to have been aware, and of all this the evidence is abundant and unmistakable; that the defendants were guilty of negligence, and that this negligence occasioned the plaintiff's injuries; and it certainly would be amazing and disappointing to me, with undisputed evidence that the defendants have been maintaining a succession of rickety steps where people are accustomed to resort for purposes of business and where steps are obviously needed, almost "from time immemorial," if any jury could acquit them of negligence.

There remains the question of invitation, express or implied, and "invitation" or invitee" is not in terms used in the statement of Willes, J., just quoted; but "invitee" is what Buckley, L. J., is referring to; the rights and obligations of an invitee and invitor are what was determined on in both cases; and it is fundamental that this, like all questions of fact or inference from facts, after proper instructions by the Court, is exclusively for the consider-

ation of the jury. If there is no evidence, of course there is nothing for them to consider; but the purpose of the plaintiff's coming, the inquiries he made, and the directions he obtained, the condition of the weather, the delay, the object he had in view, and the means he adopted for effecting it, were all matters in evidence; and, subject to the instruction of the Court, it was for the jury, and exclusively the function of the jury, to say whether, invited upon the defendants' premises, as is admitted, and for a purpose not in dispute, he acted within the meaning of the invitation, that is, acted as a reasonable man, unconscious of danger, might be expected to act under the circumstances. If reasonable jurors might, upon the evidence, answer questions 6 and 7 as they are answered, the instruction to the jury not being attacked, their findings ought not to be disturbed: *Toronto Power Co. Limited v. Paskwan*, [1915] A.C. 734, at the foot of p. 739 (22 D.L.R. 340).

What should he have done? Go back to the office and be curtly told, "Do as I directed?" Or return upstairs to be petulantly instructed, "Go back where I sent you?" Or, what I think is more likely, "Go back and go into the shipping warehouse, and, if there is no one there, shout up the elevator-shaft to the factory, and some one will come?" Or, well-chilled, should he have gone home, and, when sued for breach of contract, be told: "You should have come in, our men could not know you were there, they cannot stand out freezing in the open yard, you would want to examine the scales of course before acceptance, there were the steps, there was the open door and the comfortable fire, &c., &c.; it is plain that you were looking for an excuse to get out of your contract."

Mr. Lynch-Staunton argued that, although the plaintiff was admittedly invited to come into the yard and up to the platform, he was not invited to use, and it was not intended that he should use, the steps, or come upon the platform, avail himself of the open door or enter the factory. It was not shewn to be a factory, and the jury would be right in inferring from the evidence generally that this is a delivery warehouse; and from the fact that the scales were brought down by the elevator that the factory is in the flat above. A notice posted upon a wall does not affect a blind man or a man who does not see it or cannot read

App. Div.
1917

STRUTHERS
v.
BURROW.
Lennox, J.

App. Div.
1917

STRUTHERS

v.

BURROW.

Lennox, J.

it. "Beware of the dog" is not enough: Halsbury's Laws of England, vol. 1, p. 375, para. 818. The notice here does not affect the plaintiff's rights. He did not see it; and, more than this, he had inquired at the office, he had been directed to the yard, and he did not enter the factory, nor was he about to enter it.

That the steps were intended for the employees only, is also argued. This is not the point. The defendants, as regards persons doing business with them, must be taken to represent that their stairways, structures, and equipment are to be used as such stairways, &c., are ordinarily used. Persons coming upon business premises are not called upon to assume that appliances ordinarily used as means of access or communication are intended to be used by a limited class or for a limited special purpose only—nor are they bound to possess unerring wisdom, to proceed by the very best or most direct courses or to be always upon their guard. The girl who fell down the stairway, in a case in which an appeal was recently dismissed by this Court, because we could not interfere with the findings of the jury, was not by any means proceeding in a direct line, nor did she take at all the course she was intended to take; and, if she had, the casualty would not have occurred. The stairway in that case was not used by or intended for the use of customers; but it was recognised that it was for the jury, not for the Court, to say whether she acted as a reasonable person might act under the circumstances. It was not to be expected that the defendants here would enjoy a monopoly of all the wisest people in the land, or that ordinary people would never come to their premises; they were bound to keep their premises in a condition "to prevent damage from unusual danger" to persons coming there to do business and "exercising reasonable care."

In *Steer v. St. James's Residential Chambers Co.*, 3 Times L.R. 500, the plaintiff was not using the defendants' premises as they intended them to be used, nor was the plaintiff at the time of the accident in the passage he intended to take, the door the plaintiff opened was only intended to be operated by employees, the plaintiff professed to know the way to Brocklehurst's rooms, and so dispensed with assistance impliedly offered. The decision involved the consideration of whether the plaintiff was upon the

premises as a volunteer, licensee, or invitee. Mr. Justice Field instructed the jury that they must consider the conduct of the plaintiff with reference to the circumstances. "He must take care. All care was determined by what a man might reasonably expect, and they had to see what degree of care was necessary to be taken by the plaintiff coming into a place of that description. It was the duty of every one to use due and reasonable care to prevent doing an injury to any one to whom he may have a duty. Was there a prospect of the plaintiff falling into the well, and had the defendants taken reasonable care to prevent it?" The case was left to the jury upon questions substantially equivalent to the questions here; and, their findings being for the plaintiff, the judgment was not afterwards questioned upon any ground.

In *Butts v. Goddard*, 4 Times L.R. 193, it was not pretended that the portion of the defendants' premises intended for user by customers or intending purchasers was not in a safe condition. There were notices upon the windows and an ample and obvious means of access which the plaintiff passed by. She ignored all this, and entered another door, in the same building, and proceeded along passages and hallways not intended for people seeking to do business with the defendants, and finally, opening a door in one of the passages, fell down a stairway and was seriously injured. Mr. Justice Manisty, instructing the jury, said: "The defendants ought to have their premises in such a state that people coming to transact business had a right to suppose those premises to be in a reasonably safe condition." (This sentence is not accurately reported, but the meaning is plain.) "The difficulty in this case was that the door here was not the usual door. No doubt the plaintiff was under the impression that she was entering in at the proper door. The jury would have to deal with the fact whether she was reasonably right in that impression. If they thought that the defendants had these premises, and had them so that a person might reasonably suppose he should go in there, then an invitation was held out to go there, and the defendants were bound to have that access reasonably safe. . . . Were they guilty of negligence, and did that lead to the accident, and was the plaintiff justified in thinking she was going in at the proper door?" The whole matter was left to the jury, they found for the plaintiff, judgment was directed to be entered for the plaintiff, and the propriety of the trial or the right of the

App. Div.
1917

STRUTHERS
v.
BURROW.

Lennox, J.

App. Div.
1917

STRUTHERS
v.

BURROW.

Lennox, J.

plaintiff to recover was not questioned. It is all a question for the jury, as these cases shew.

It was the same in *Mason v. Langford* (1888), 4 Times L.R. 407, where the person injured came to the defendants' shop after closing hours and after the shutters had been drawn, and, finding the door slightly ajar, entered the shop. Hawkins, J., expressing a strong opinion against the right of the plaintiff, still left the question of invitation to the jury.

"It is necessary to distinguish between the standard of care ordinarily required and the degree of care actually exercised. It is the duty of the Court, if necessary, to define what the standard is, and the duty of the jury to decide, when the facts are in dispute" (and even if they are not in dispute?), "whether such standard has been attained:" Halsbury, vol. 21, p. 362, para. 630.

It was strenuously argued that a door, even an open door, means a "bar, a barrier, a notice not to enter," &c. I was not impressed; a solid wall would be more effective. It is a question of conditions. The open door of a church would be a fairly clear invitation to enter. The unfastened door of a shop, hotel, railway station, and of business premises generally, is usually regarded as license or invitation to enter to people having occasion to enter, without more. In international affairs "the open door" is an announcement to the world of unrestricted ingress and egress. To talk of actual or specific purpose or intent as distinguished from the import of obvious conditions is to evade the issue. The question always must come back to this: "Were the defendants' premises maintained in a reasonably safe condition for persons lawfully coming upon the premises and using them in the way they were likely to be used by such persons?" The defendants' responsibility must be measured not by their unknown intention but by the conditions which they allow to exist and their neglect to provide for the safety of persons to whom they owe the duty of care arising out of business relations or otherwise. They must assume that things upon their premises will be used in the way such things are ordinarily used, and that they will be used upon the assumption that they are safe and adequate. If they provide seats or a drinking fountain, and a person waiting to be served on that part of the premises, uses either and is injured by reason of the defendants' negligence, they cannot escape liability by

saying, "We intended the seats or the drinking water," as the case may be, "for the use of our employees only." Why? Because they must provide against unusual dangers and against injuries likely to arise out of the ordinary user of the premises by their customers in the condition in which they find them—they must foresee what is likely to, or probably may, happen. They must be bound by what they do or negligently suffer or omit to do. It is a peculiar argument that, because the negligence here was of an exceptionally flagrant character, because for years they had substituted one temporary contrivance for another, no proper steps at any time but always some makeshift erection, the plaintiff, using the steps the defendants provided in good faith for a purpose for which their position indicated they were intended to be used, in pursuance of his contract, and without negligence, is without remedy, but would not have been without remedy, had they been, though still unsafe, much better than they were.

The character or status of a person accidentally injured upon the premises of another, in relation to the owner of the premises, is not a question of law to be determined by the Judge or a Court—but a question of fact to be determined by the jury upon the evidence. Whether the plaintiff, upon the facts disclosed, was, at the time of the accident, upon the premises in the character of a trespasser, licensee, invitee, guest, or visitor, is a question of fact, and all questions of unusual hazard, want of repair, and negligence, are also questions of fact, and none of them can be withdrawn from the jury; *Toronto Power Co. Limited v. Paskwan*, [1915] A.C. 734, at pp. 738, 739; *Hanson v. Lancashire and Yorkshire R.W. Co.* (1872), 20 W.R. 297, judgment of Willes, J.; the legal rights, if any, of the person injured, when the facts are found, are for the determination of the Court.

In the *Paskwan* case, at p. 739, Sir Arthur Channell said: "The jury might perhaps under such circumstances have found that there was no want of reasonable care and only an error of judgment, but this jury have not done so. It is enough to say, . . . that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The learned Judge could not have ruled that as a matter of law the answer of the defendants was necessarily con-

App. Div.
1917

STRUTHERS
v.
BURROW.
Lennox, J.

App. Div.
1917

STRUTHERS
v.

BURROW.

Lennox, J.

clusive in their favour. It is unnecessary to go so far as Middleton, J., did in the Court below and say the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

Lord Chancellor Cairns puts the matter just as definitely in *North Eastern R.W. Co. v. Wanless* (1874), L.R. 7 H.L. 12, at p. 14: "The only question raised in the case for your Lordships' determination is, whether there was here evidence of negligence to go to the jury? What the jury should do upon the evidence, or whether they should find any damages or not, was a question for the jury, and is not for this House now to consider."

The learned trial Judge here could not, in my opinion, have properly withdrawn the case from the jury—there was evidence which the plaintiff was entitled to have submitted to them.

I am definitely of opinion that not only was there evidence to go to the jury upon which they might reasonably find that the plaintiff was an "invitee" when using the steps, within the meaning of that expression as used by the Courts, but further, were it not for the doubt of my own judgment necessarily engendered by finding my opinion in conflict with weighty and learned judgments of more experienced members of the Court, I would have thought that the question was not reasonably open to debate; in fact, that the jury could not, upon the evidence, have reasonably come to a conclusion other than they did.

It is argued that the plaintiff had no right to go upon the platform at all, or, if he did, he must step directly from his waggon. It is shewn that it was impossible for him to get from the kind of waggon he had directly upon the platform. It is said he must stay upon the waggon or stay at the platform and take delivery there—that it was for the employees of the defendants to bring out the merchandise and place it upon the waggon. This is not the evidence of the way goods were delivered at the defendants' warehouse: on the contrary, the evidence is, that the practice was for men who came for goods to go upon the platform, and go into the warehouse, and assist in the bringing forward and loading of the goods; and I venture to think, if a record could be obtained, that there is hardly an instance of delivery of heavy or bulky merchandise from that warehouse within the last dozen years, unless the man taking delivery was an invalid or a cripple or the

horses had to be held, in which he did not assist, and generally, although of course not invariably, go into the warehouse; and the jury were at liberty to apply their everyday common experience in drawing inferences of fact. It is common knowledge, it is universal or nearly universal custom, everywhere in this Province, in handling this class of goods.

I think the judgment should stand. But, if it should not, I am of opinion that the proper remedy is not a dismissal of the action, but a new trial. I am of course proceeding upon the basis, on which I have already sufficiently emphasised the opinion I entertain, that there was evidence to go to the jury upon the questions in issue. If there was, and their intention and meaning can be ascertained, the Court must give effect to it: and how far the Court should go in doing this, and that it must adopt no narrow or technical construction, is made clear by the judgment of the Privy Council in *British Columbia Electric R.W. Co. Limited v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4. It is not to be expected or required that juries will state their conclusions with judicial precision. In this case I think the jurors have made their meaning reasonably plain.

The issues to be determined, including the obligations of the defendants and the reasonableness of the plaintiff's acts and his rights, are dependent upon questions and inferences of fact. This Court has no power, however strongly entertained, to substitute its opinion for the findings of a jury based upon evidence, if adequately expressed. If the findings are inconclusive and unintelligible, the case has not been tried, and must go for trial. New trials are undesirable, and, with a view to preventing unnecessary litigation, Courts have endeavoured to reach finality at as early a stage as possible: see *James v. Clement* (1886), 13 O.R. 115; *Palmer v. Miller* (1887), 13 O.R. 567; *Lancey v. Brake* (1886), 10 O.R. 428; and *Hamilton v. Johnson* (1879), 5 Q.B.D. 263—to refer to a few of the numerous cases: and where it is clear that upon a new trial there could be no additional facts adduced, and upon the facts in evidence no jury of reasonable men could reach the conclusions complained of, it may be right for the appellate Court to dispose finally of the action: *Paquin Limited v. Beauclerk*, [1906] A.C. 148, 162, and many other cases. Section 27 of the Judicature Act is pretty broad and general in its terms;

App. Div.
1917

STRUTHERS
v.
BURROW.
Lennox, J.

App. Div.
1917
STRUTHERS
v.
BURROW.
Lennox, J.

but, broad as it is, in the view I entertain of the facts of this case, and having regard to what I understand to be the effect of *Watt v. Watt*, [1905] A.C. 115, and *Toronto R.W. Co. v. King*, [1908] A.C. 260, I am, with deference, of opinion that an order should not be made for dismissal of the action.

Reverting to the main question, I think the appeal should be dismissed with costs.

MAGEE, J.A., agreed with LENNOX, J.

Appeal allowed; MAGEE, J.A., and LENNOX, J., dissenting.

[APPELLATE DIVISION.]

1916
June 2.
1917
June 8, 22

BALDWIN v. O'BRIEN.

Way—Public or Private Lane in City—Dedication as Highway—Evidence—Onus—Intention of Owner of Land—Acceptance—Public User—Tolerance—Absence of Municipal Action—Right of Way—Easement—Devise—Lost Grant—Prescriptive Right—Limitations Act, sec. 35.

A lane 12 feet wide, between buildings on the north side of King street, in the city of Toronto, running from King street north to Pearl street, was held, not to be a public highway, the defendants failing to establish a dedication of it by the owner of the land of which it formed part; and, if dedication were shewn, the evidence of acceptance thereof being insufficient.

The onus of proving dedication and acceptance was on the defendants; proof of the owner's intention to dedicate was essential, and was entirely lacking; and such user of the lane by the public as was shewn must be ascribed to tolerance rather than to right. There was no municipal action in regard to the paving, repairing, lighting, etc., of the lane, such as might constitute an acceptance by the municipal corporation.

Review of the authorities.

The effect of a judgment, pronounced in 1877, in an action between two tenants for years, finding the lane in question to be a public lane, discussed.

The judgment was regarded as evidence in the defendants' favour, but not as an estoppel in whole or in part.

Neill v. Duke of Devonshire (1882), 8 App. Cas. 135, distinguished.

Judgment of MIDDLETON, J., finding that there was a dedication before the year 1834, reversed.

Held, also, that the alternative claim of the defendants to a right of way over the lane with access to their land, under a devise, or a lost grant, or by virtue of sec. 35 of the Limitations Act, R.S.O. 1914, ch. 75, was not maintainable.

ACTION for an injunction and damages in respect of trespasses alleged to have been committed by the defendants upon a strip of land, which, the defendants maintained, was a public lane or highway.

October 13, 1915, and January 3, May 15, 16, 17, 18, 19, and 29, 1916. The action was tried by MIDDLETON, J., without a jury.

E. D. Armour, K.C., and *J. W. Carrick*, for the plaintiffs.

W. N. Tilley, K.C., and *Strachan Johnston*, K.C., for the defendants O'Brien, McLean, and Verral.

J. A. Paterson, K.C., for the defendants the North American Life Assurance Company.

J. H. Moss, K.C., for the defendants *Ross et al.*

1916
BALDWIN
v.
O'BRIEN.

June 2, 1916. MIDDLETON, J.:—The question arising in this action is the existence of an alleged public lane running from King street to Pearl street, immediately west of the North American Life building, and a little east of York street, in the city of Toronto.

According to the original plan of the town of York, the block lying between King street on the south, Adelaide street on the north, York street on the west, and Bay street on the east, comprised eight lots, four fronting on Adelaide street and four fronting on King street, each supposed to contain one acre. There is no certainty as to the exact boundaries of this block; but, as laid out upon the ground, the entire block contains somewhat more land than 8 acres. The lot at the corner of King and York streets, known as lot No. 8, the lot immediately to the east known as lot No. 7, both on the north side of King street, are the only lots which need be referred to.

To understand the questions raised it will be necessary to trace the titles of these two lots.

On the 22nd July, 1806, lot No. 8 was patented to William Cooper, and was described as containing one acre, bounded as commencing on the north side of King street at the south-east angle of the lot, thence north 16 degrees west, in a direction which would be parallel to York street, 3 chains and 17 links, to the centre of the block, thence, in a direction which would be parallel with King street, to York street, thence southerly to King street, thence along King street to the place of beginning. For convenience' sake it may be said that the distance given, 3 chains and 17 links, is 209 feet $2\frac{3}{4}$ inches; and, as the western boundary of the lane in question is 210 feet 11 inches from the corner, it may fairly be assumed that it was intended to lay out

Middleton, J.

1916

BALDWIN

v.

O'BRIEN.

the lane on the westerly part of lot 7. It certainly does not encroach upon lot 8.

On the 6th March, 1807, William Cooper conveyed lot 8 to Susanna Maria Willcocks.

On the 17th June, 1816, the Crown patented lot 7 to Charles Willcocks, describing it as containing one acre and as having a frontage of 3 chains and 17 links on King street, immediately to the east of the land already described as lot No. 8.

On the 26th October, 1816, Charles Willcocks conveyed this lot to Maria Willcocks, no doubt the same person as Susanna Maria Willcocks.

On the 29th May, 1834, Susanna Maria Willcocks made her will, executing it in the name of Maria Willcocks. The will was admitted to probate on the 6th September, 1834, although the fact of her death is not recited in the probate. Miss Willcocks had acquired title to the westerly 6-acre lots of the block of 8 acres. By her will she gives to her brother-in-law William Warren Baldwin and her sister Margaret Phœbe Baldwin, and the survivor, a life-estate in all her lands; and upon the decease of the survivor lot No. 8 is, *inter alia*, given to Robert Baldwin and Augusta Elizabeth, his wife, for life, and upon the death of the survivor lot No. 8 is given to trustees for the life of Phœbe Maria Baldwin, and upon her decease among her children in fee.

No. 7 is, subject to the life-estates, given to her nephew William Augustus Baldwin in fee. William Warren Baldwin died in 1844, and his wife six years later, in 1850; but in 1845 she conveyed to her son William Augustus Baldwin, who thus in that year became the owner in fee.

No. 8, on the death of Mrs. Baldwin in 1850, became vested in the Hon. Robert Baldwin for his life. He died in 1858, his wife having predeceased him. The trustees then held for Phœbe Maria Baldwin during her life. She died on the 10th July, 1866. On the 18th October, 1866, conveyances were made by her heirs at law, partitioning her estate—William Augustus Baldwin, the surviving trustee, joining therein.

Lot 5, according to a plan prepared by Passmore, being the easterly portion of the former town lot No. 8, and lying immediately west of the lane in question, running from King street to Boulton street, was conveyed to Augusta Elizabeth Ross; and under this

title the defendant O'Brien claims. The defendants Ross *et al.*, represented by Mr. Moss, are the defendant O'Brien's mortgagees, and pending this litigation have been paid off.

Lot No. 7, it will be recalled, became vested in William Augustus Baldwin in fee simple in 1845. He held this land in fee simple for seven years, and in 1852 he executed a settlement, reserving to himself a life-estate. He died thirty-one years thereafter, in 1883.

The trustees of this settlement were originally the Hon. Robert Baldwin and Lawrence Heyden. On the 18th August, 1868, Henry St. George Baldwin and Robert Russell Baldwin were appointed trustees, and by an order of Vice-Chancellor Mowat, dated the 24th June, 1872, their appointment was confirmed.

Under the settlement, or possibly under the will of William Augustus Baldwin, the property became vested upon his death in his children. It is not necessary to trace the devolution of title of lot 7 in further detail; it is sufficient to say that it is now vested in the plaintiffs.

Both lot 7 and lot 8, or at any rate those portions of them adjoining the so-called lane, have been held under long leases. Omitting for the present a very early lease, those of importance are as follows:—

On the 8th December, 1868, the owners of lot No. 7, i.e., William Augustus Baldwin and the trustees of his settlement, made a lease to one James Walsh of part of lot 7, described as commencing on King street at the south-west angle of the land owned by W. A. Baldwin, thence east along the north side of King street 175 feet to lands already leased by the lessor to the lessee, thence north, parallel with York street, to Boulton street, thence along the south limit of Boulton street 175 feet to the north-west angle of the land owned by Baldwin, thence south, parallel with York street, to the place of beginning. The importance of this description arises from the fact that this land was land altogether east of the lane, and the east limit of the lane is thus described as the western limit of the land owned by William Augustus Baldwin.

On the 27th September, 1869, William Augustus Baldwin and the trustees under his settlement made a lease to George Loveys

Middleton, J.

1916

BALDWIN

v.

O'BRIEN. •

Middleton, J.

1916

BALDWIN

v.

• O'BRIEN.

of a parcel of land described as part of lot No. 7, commencing on King street at the south-west angle of lot No. 7, thence north, parallel with York street, to the south side of Boulton street, thence easterly, parallel with King street, 13 feet, thence southerly, parallel with York street, to King street, thence westerly, along the north limit of King street, 13 feet, to the place of beginning. This lease called for payment of an annual rent of \$52. The land covered by this lease was evidently the lane in question. There is some discrepancy between the width given of 13 feet and the width of the lane as it is upon the ground to-day, but the reason for this will be clear when the question of surveys is discussed. Loveys and Walsh, the two lessees, were in partnership as lumber merchants, and there is no doubt that the two leases were taken for the purposes of the lumber-yard. As to the mode of user of this lane there is much conflict upon the evidence, which will have to be discussed.

The Walsh and Loveys leases were each for the term of twenty-one years, and so would not expire until 1899 and 1890, and they contained certain renewal rights. In 1875, the United Empire Club, having acquired the leasehold title of both Walsh and Loveys, erected a building immediately to the east of the lane. This lease was subsequently assigned to the Canadian Pacific Railway Company, and by that company it was further assigned to the North American Life Assurance Company. The Walsh lease was surrendered and a new lease taken by the North American Life Assurance Company from the Baldwin estate.

On the 1st day of July, 1871, Mrs. Ross, the owner of lot No. 8, made a lease to one Perkins of lots 4 and 5, according to Passmore's plan, that is, of land west of the lane, for the term of twenty-one years. On the 31st December, 1872, Perkins assigned this lease to G. P. Shears. On the 3rd December, 1875, Shears further assigned the lease to J. B. Irwin.

On the 20th June, 1874, J. B. Irwin executed an underlease of the land to Patrick Hughes and Bernard Hughes, for a period of eighteen years from the date of this lease. On the 1st July, 1892, a new lease was made by Mrs. Ross to Irwin for the term of twenty-one years from the 1st July, 1892, and on the 20th June, 1893, Irwin executed a new sublease in favour of Hughes for twenty-one years, from the 20th June, 1892.

In July, 1910, the National Trust Company, who appear to have succeeded to the Hughes title, made a short lease to John McLean of the ground-floor of the store known as 120 King street west, being the premises immediately west of the lane.

On the 21st June, 1877, Hughes, who was then the tenant on the west side of the lane, brought action against the United Empire Club, the tenants on the east side of the lane, alleging that the lane was a highway particularly used by the plaintiffs to obtain access to their premises, and that the defendant had during the last two years obstructed the plaintiffs in their use of the lane by gates erected across it, and in the alternative that they had a right of way over the lane. This action was tried on the 7th November, 1877, before Mr. Justice Gwynne, who found for the plaintiff. The judgment was not entered up until the 30th April, 1886, and, as entered, awards a writ of injunction restraining the defendant from obstructing the user of the right of way by the plaintiffs and the public.

The written reasons of Mr. Justice Gwynne state that prior to 1832 the persons in possession of town lots 7 and 8 laid out the lots into small lots for leasing, and dedicated and set apart the land in question for a lane for the necessary use and convenience of the tenants of the subdivided lots, and leased lots adjoining on either side of this lane, and that in October, 1866, the owner of lot 8 had a survey made in subdivisions different from those which had been leased, and that this plan shewed, immediately adjoining lot 8 on the east, a lane 12 feet in width, which was on the same site as the earlier lane, though not of the same width; this plan being signed by the then owner of lot No. 7 in order that it might be registered. The learned Judge further finds, with reference to the Walsh lease of December, 1868, that it extended to the eastern limit of the land laid out as a lane; and, therefore, the Judge finds that the lane in question "has been and is a public lane, specially dedicated by the owners of lot No. 7, as well for the convenience, use, and enjoyment of the lessees and owners of the said lot 8, as of the owners and lessees of the said lot number 7."

Turning now to the documentary evidence relied upon as shewing dedication. A lease, made on the 27th May, 1819, by William Warren Baldwin to Josiah Cushman, is the first that

Middleton, J.

1916

BALDWIN

v.
O'BRIEN.

Middleton, J.

1916

BALDWIN

v.

O'BRIEN.

calls for notice. On this date Miss Willcocks was the owner of the land, but I think it is a fair thing to assume that the lease then made by her brother-in-law must have had her approval. The lease is a registered instrument. It covers the whole 6 lots, and is for the term of four years, at the nominal rental of 5 shillings; the tenant agreeing on his part to enclose and fence upon existing pickets with a sufficient board-fence. The lease then recites that Baldwin has divided the 6 acres of land into 36 building lots, to be let or sold as he may offer; and in his description each of these lots has a frontage of 34' by a depth of 188' at right angles to the front, and they are marked from east to west, upon "a certain diagram thereof now exhibited to the parties hereto at the time of the execution hereof," with the letters A to S. This would give 18 lots upon each street; and the depth given, 188 ft., shews that the lots upon this land did not go to the centre-line of the block, but fell short of it by some 21 ft. This indicates that the street formerly known as Boulton street, and now known as Pearl street, had been laid out upon this plan, for it consists of the rear 20 feet more or less of the two tiers of lots. It will be noticed that this document speaks of the lots as running alphabetically from the east to the west. There is reason to suppose that this is an error, and that the lots were really lettered from the west to the east. This lease itself contains no reference to the lane, but 18 lots of 34 feet frontage would give a total of 612 feet, and the 3 lots—even if there was no overrunning, as no doubt there was—would leave 18 feet of a surplus; so that the existence of a lane upon the plan is at least possible.

On the 18th November, 1839, one James Thomas mortgaged certain lands to one John Bishop. These lands are described as being part and parcel of lot No. 7, "which on a plan or diagram of the said lot now in possession of William Warren Baldwin . . . is marked with the letter G, and which is described as commencing on King street at the south-east angle of lot lettered G, thence northerly, at right angles with King street along the boundary between lots G and H on said diagram, 184 feet to the north-east angle of G, thence westerly, at right angles to the last mentioned course, 34 feet to the reservation for a lane, thence southerly along the east side of the lane to King street, thence easterly along King street to the place of beginning.

This description shews two things: first, that lot G was west of lot H, so that the lettering must have been from the west to the east; and, secondly, that lot G was immediately east of the reservation for a lane upon the plan or diagram in the possession of William Warren Baldwin. If this is so, then there would be 6 lots of 34 feet west of the lane, or a frontage of 204 feet on King street.

By a lease dated the 31st July, 1857, one Boulton assigned a lease of certain lands to one Barnard. The lease is recited as bearing date 1840, and being made by William Warren Baldwin and his wife, his heir apparent, and trustees under the settlement. The lands are described as being composed of that part of lot No. 8 south of Newgate street (Adelaide street) marked A on "the diagram or plan thereof drawn by William Warren Baldwin," and these lands are then butted and bounded as shewing a frontage on the south side of Newgate street at the corner of York street of 38 feet by a depth of 184 feet to the "north side of Broad lane."

This shews three things of importance: first, that on the plan referred to the lot at the west was lettered A; secondly, that its width was 38 and not 34 feet; and, thirdly, that the plan shewed what was later known as Boulton street and Pearl street, as being "Broad lane." So that, if the corner lots were given a frontage of 38 feet instead of 34 feet, the discrepancy between the width of the 6 lots and the space upon the ground would be explained.

The next matter of importance is the plan prepared by the late F. F. Passmore of the 13th October, 1866, already referred to as being a subdivision of lot 8 north of King street and lot 8 south of Adelaide street. This plan was registered on the 18th October, 1866, as No. D. 32, and it is signed, not only by the representatives of Miss Baldwin, whose estate is being laid out, but also by Mr. W. A. Baldwin, who was not only a trustee with respect to these lands but the life-tenant under his own settlement of lot No. 7, and who undoubtedly knew the exact situation of the property at the time. Upon this plan the lands subdivided into 10 lots are shewn as coloured pink, and the streets adjoining are coloured brown. The matter of importance is that not only Boulton street but the lane is coloured in the same way: this going to shew that they were at that date recognised as con-

Middleton, J.

1916

BALDWIN

v.
O'BRIEN.

Middleton, J.

1916

BALDWIN

v.

O'BRIEN.

stituting public highways. The frontage of the property on King street between York street and the lane is given as 209 feet 11½ inches.

Mr. Passmore's field-notes have been produced. They shew the lane, the buildings erected on the west side of it, and a skating rink to the east.

There is much evidence going to shew that, when the Hughes building was erected on the west side of the lane, it encroached, possibly to the extent of 2 feet, upon the lane. I do not know that this is of any importance in the present controversy, and, it not being material to this dispute, I make no finding on the point; but this fact was made much of in what took place after the judgment pronounced by Mr. Justice Gwynne.

In 1873, a plan was prepared for the purpose of having plan D. 32 amended by making a new subdivision of the lots that were formed from lot number 8 on the north side of King street, but this was never registered. In this amended plan the lane in question is also shewn as a lane; and a new lane parallel to King street, halfway between Boulton street and King street, is also shewn, running from York street to the lane. The western boundary of the lane is upon this plan marked as the eastern boundary of lot number 8. There is nothing to indicate that the owners of lot number 7 were in any way parties to this plan.

The judgment of Mr. Justice Gwynne, as already pointed out, was in litigation solely between the tenants of the property. One cannot help suspecting that in substance, though not in form, the representatives of the Baldwin estate were really parties to this litigation; for it is shewn that Mr. Defoe, the solicitor to the Baldwin estate, appeared as counsel for the United Empire Club, the tenants of the Baldwin estate; but nothing has been shewn to justify more than a suspicion.

The course of events after this judgment is not easily understood. The reasons for judgment and pleadings shew that in 1875, when the United Empire Club building was erected, gates were placed upon the lane. These gates were no doubt removed in obedience to the injunction; and that may explain why no formal judgment was entered or injunction issued. Matters seem to have slumbered until 1886, when the judgment was entered up.

Middleton, J.

1916

BALDWIN

v.
O'BRIEN.

In 1888, the Baldwin estate undertook to erect gates at both ends of the lane; and I am satisfied that, from the date of the judgment in 1877 until that time, no gates were standing. The Canadian Pacific Railway Company was then in possession of the United Empire Club building, and the portion at the rear was used by the Dominion Express Company for its express offices. Messrs. Henderson & Small gave a key to the Dominion Express Company, and I have no doubt the intention was at that time to lock the gates on Sundays and holidays, and, when convenient, at night; as Mr. Small put it in his letter of the 28th February, 1888, "so that the land in question may not be used as a public resort or a thoroughfare, and that trespassers may not annoy yourselves and the other tenants of the estate."

This action at once produced a protest from the solicitor of Mr. W. W. Baldwin, who was interested in some lands to the west of the lane—lot 8 on the south side of Adelaide street. He wrote on the 5th March, claiming that the lane was a public one, and that no one had the right to place a gate or obstruction, and threatening proceedings. A similar note was sent to the solicitors of the Canadian Pacific Railway Company. On the 8th March, the solicitors for that company wrote to Messrs. Henderson & Small, reminding them that the gates were erected at the instance of the owners of the freehold, and asking them to deal with the matter. Henderson & Small immediately commenced correspondence with Messrs. Morris & McNab, Mr. Baldwin's solicitors; but nothing appears to have come of it.

Up to this time the municipal authorities had treated the lane as public property, and had not assessed it. In the assessment rolls, on some occasions, the lane is mentioned: e.g., in 1875, between the United Empire building and the Hughes building there is an entry "Public Lane;" in 1879, "lane 12 feet wide intersects:" and in 1881 and 1884 there is a similar entry. In 1888 the entry is, "lane 11 feet wide."

It was apparently thought that the position of the Baldwin estate might be improved if the lane were assessed; and in October, 1888, an arrangement was made between the Baldwin estate and the railway company that there should be an appeal for the purpose of having the land assessed. An appeal was accordingly

Middleton, J.

1916

BALDWIN

v.

O'BRIEN.

lodged by the Baldwin estate, and upon the consent of the railway company the appeal was allowed and the latter assessed. Obviously this strategic move has no significance.

The lane being open all day, and closed only at nights and on Sundays and holidays, no inconvenience was occasioned either to those more immediately concerned or to the general public, and the lane continued to be used, the extent of the user being somewhat well indicated by the letter from the solicitors for the Canadian Pacific Railway Company to the solicitors for the Baldwin estate, of the 16th July, 1889, containing a complaint that "the Dominion Express Company were being put to great expense in keeping this passage planked, which is constantly worn out by the passage of teams belonging to outside parties." The manager of the express company "feels that he should not be at the expense referred to unless he is authorised to close the passage at the rear to prevent any teams other than his own to use the passage and wear out the planking." The reply is: "The matter is in the hands of counsel, and his opinion is expected in a day or two." After further request for attention, it is, on the 16th August, stated: "The opinion of counsel has been received. The matter will require further investigation before an answer can be given."

Nothing seems to have been done for over a year; but in October, 1890, Messrs. Morphy & Millar, who were the solicitors for the Messrs. Hughes, wrote to the railway company informing them of the judgment of Mr. Justice Gwynne and the direction contained in it for the removal of all obstructions such as gates and fences, and stating that, if the obstructions were not removed, judgment would be enforced against the railway company. This was turned over by the company to the solicitors for the Baldwins; but again nothing was done for a long time; this delay being probably explained by litigation between the Baldwin estate and the railway company. When this was ended, the matter of the lane was again taken up—in September of 1894—when a copy of the judgment of Mr. Justice Gwynne is submitted by Mr. Small to the railway company.

Once more there is a lull; for the next letter put in is from Mr. Millar on the 14th November, 1897, to the North American Life Assurance Company, who had then succeeded to the railway

company's title. Mr. Millar refers to the old judgment, and threatens proceedings if the gates are not removed. The solicitors for the North American Life Assurance Company refer the matter to the lessors, and in the meantime promise as a matter of courtesy that there will be no inconvenience to Mr. Millar's clients.

Mr. Millar on the 19th October protested that, notwithstanding this, inconvenience had been caused.

On the 23rd, the North American Life Assurance Company promised to leave the gates open until they could investigate the situation and come to some decision, and so advised the Baldwin estate; but nothing appears to have been done, for on the 9th April, 1898, the North American Life Assurance Company write: "The position of the so-called lane is very annoying to the company. Excavations have been made in the soil and iron gratings put in to give light to the adjoining property. Ashes and rubbish of all kinds are put in the lane by them, and they use it for an entrance to their property as if the lane were their own. The North American Life Assurance Company are not willing to submit to this, and will before long have to take some action to protect themselves."

An agreement as between the North American Life Assurance Company and the Baldwins was submitted regarding the lane, but not accepted, and the user by those claiming the lane is described in a letter of the 28th April, 1898: "The adjoining lessees to the west are using the vacant land, being the westerly portion of the land leased to us, in spite of our efforts to prevent them, and in addition to this they have dug up the soil to put in gratings so as to admit the light through their cellar-windows."

On the 15th October, 1912, the solicitors write again: "This lane is being used by the persons to the west, and you must protect us against that. Our view is that we should proceed to bar up that door, and if they sue us, which no doubt they will, we will have to call upon you to protect us under your clients' covenant."

The reply from the Baldwin solicitors is on the 31st October, 1912: "We regret to see from your letter of the 15th October that nothing has been done yet in this matter. For fifteen years your company has spoken of taking action. We think, if action had been taken sooner, there would have been no difficulty. In any case we are unable to recognise any liability under the circumstances."

Middleton, J.

1916

BALDWIN

v.
O'BRIEN.

Middleton, J.

1916

BALDWIN

v.

O'BRIEN.

I have thus summarised the facts that appear to me important, so far as they can be gathered from the documents.

At the hearing, it was established by oral evidence that, from the time the Hughes building was erected, there was a door in the east wall opening upon the lane, which was used freely. It was also established that the lane was used as a means of access to the building immediately west of street number 120, and that the lane was used for the purpose of getting in coal, removing garbage, and for the purpose of receiving merchandise, at the Hughes store, not only during the time that the Messrs. Hughes themselves occupied the building, but in the time of their tenants.

It was also established by the evidence of a number of old residents that the hotel-building erected immediately west of the lane, on the King street front, had a side-entrance to the bar and an entrance to the yard and stables upon the lane, and that all these were freely used for very many years; the evidence going back to 1842, and indicating that the condition of affairs was then one of long standing. During all this period, the public used the lane as a public highway.

During the period that Walsh and Loveys had a lumber-yard, the evidence is not quite clear. The weight of evidence favours the view that no lumber was piled upon the lane, and that it was always open to the public, though used by the lumber-merchants for the loading of their waggons, and possibly occasionally for the piling of some posts. I also think that the weight of evidence is in favour of the view that there was some kind of a fence along the eastern boundary of the lane.

Along the King street front, east of the lane, a number of houses were erected. These were ultimately pulled down, or, being frame-houses, were moved to other property. This left the excavation for the cellars adjacent to King street, and a substantial fence was erected along the King street frontage. Afterwards, the portion of the land immediately east of the lane was used as a skating rink for some years, and undoubtedly a fence was then erected along the east boundary of the lane. This condition of affairs existed until the period of the Walsh and Loveys lumber-yard, and, I think, till the time of the erection of the United Empire Club building, when apparently some endeavour was made to reclaim the lane and treat it as private property.

Upon the facts, which I have perhaps summarised at needlessly great length, matters of considerable legal difficulty present themselves. Mr. Tilley claims that the lane in question was dedicated to the public and became a highway. Mr. Armour argues that, not only must there be an intention to dedicate shewn, but the intention to dedicate must be found in one who had the right to dedicate effectually; and that, as the property has been practically, throughout the whole critical period, in the possession of tenants for life and tenants for years, no dedication can be shewn which would be binding upon the remaindermen. The validity of this argument depends upon the time when the dedication is suggested to have taken place. Mr. Justice Gwynne, on the evidence before him, came to the conclusion that the dedication took place in 1832. If this be so, it was in the lifetime of Susanna Maria Willcocks; for she did not die until 1834, and she was the owner in fee simple.

Upon the evidence before me, I have arrived at the conclusion that the dedication took place even earlier than that date. I think the plan referred to in the Cushman lease of 1819, when the whole 6 acres was first subdivided, and lands were leased, indicates that this lane was then part of the scheme of subdivision; and that, when Mr. W. A. Baldwin became the owner in fee simple in possession, he must be taken to have adopted that which was done by his father long before; for I find that, not only was there no dissent by him during his long life (he died in 1883), but, upon the registration of the plan D. 32 in 1866, he expressly assented to the representation of this lane as a highway; and, once dedicated, the public rights could not be extinguished by the erection of gates in 1888, nor by the subsequent acts of the Baldwins and their tenants. To be effective, Mr. Baldwin's assent must have been before 1852, when he made the settlement—I think he assented before that date.

Having come to this conclusion, it is not necessary for me to discuss the alternative theory presented by Mr. Tilley. He contends that, if there was no dedication by Miss Willcocks during her lifetime, when she dealt with the property under her will by giving the one lot, subject to the life-estates of her sister and her brother-in-law, to Robert Baldwin, and the other lots, subject to the same life-estates, to William Augustus Baldwin, it must be

Middleton, J.

1916

BALDWIN

v.
O'BRIEN.

Middleton, J.

1916

BALDWIN

v.

O'BRIEN.

taken that she intended them to take and enjoy the property subject to the mode of use and occupation adopted by her in her lifetime; the principle relied upon being that laid down in *Phillips v. Low*, [1892] 1 Ch. 47.

In dealing with this case on the ground which appears to me to be sufficient for its determination, I am acting upon the facts proved, apart from the judgment of 1877. Nevertheless, I think that that judgment can be looked at, having at least the effect of a deed of that date.

As my judgment does not turn upon this, I refrain from discussing the authorities.

The action fails and must be dismissed with costs.

The plaintiffs appealed from the judgment of MIDDLETON, J.

February 27 and 28 and March 1, 1917. The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., LENNOX and ROSE, JJ.

E. D. Armour, K.C., for the appellants. The learned trial Judge erred in determining that the place in question was a public highway, having been so dedicated by Miss Willcocks, the owner, previously to 1832. There was no evidence warranting such a finding. The onus of shewing dedication is upon the defendants: *Macomb v. Town of Welland* (1907), 13 O.L.R. 335. The user of the public may be evidence of the intention to dedicate, but is far from conclusive: *Poole v. Huskinson* (1843), 11 M. & W. 827; *Mann v. Brodie* (1885), 10 App. Cas. 378, at p. 386; *Attorney-General v. Esher Linoleum Co. Limited*, [1901] 2 Ch. 647, at p. 650. There is nothing in the evidence to shew that any subsequent owner dedicated the lane to the public as a highway. While public user may be evidence of dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee: *Folkestone Corporation v. Brockman*, [1914] A.C. 338, at p. 352. In the present case, while there may have been user, it was not user as of right, but by grace of the owner. There is not the slightest evidence of acceptance by the municipal corporation: *O'Neil v. Harper* (1913), 28 O.L.R. 635, 10 D.L.R. 433, 13 D.L.R. 649; *Peters v. Sinclair* (1913), 48

S.C.R. 57, 13 D.L.R. 468; *Turner v. Walsh* (1881), 6 App. Cas. 636; *Copestake v. West Sussex County Council*, [1911] 2 Ch. 331. If there was no dedication in the lifetime of Miss Willcocks, nothing has transpired since to make the place a public highway; and all the intervening period must be looked at: *Healey v. Corporation of Batley* (1875), L.R. 19 Eq. 375; *Coats v. Herefordshire County Council*, [1909] 2 Ch. 579; *In re Morton and City of St. Thomas* (1881), 6 A.R. 323; *Brett v. Toronto R.W. Co.* (1909), 13 O.W.R. 552; *Cheney v. Cameron* (1858), 6 Gr. 623; *Adams v. Loughman* (1876), 39 U.C.R. 247. The supposition that the gates were taken down in obedience to the judgment in the *Hughes* case is only supposition, and is opposed to Small's and other evidence: *Rex v. Baugh* (1916), 36 O.L.R. 436, 31 D.L.R. 66. As to the alternative contention of the defendants, that, if the place was not a public highway, it was a private lane over which they had obtained a right of way by prescription, I submit that, if the use which they made of the lane was attributable to their belief that it was a public highway, they did not by such use acquire an easement: *Adams v. Fairweather* (1906), 13 O.L.R. 490; *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool) Limited*, [1915] A.C. 599. As to the claim of the defendants based upon a lost grant, it has not been proven that the way used in Miss Willcocks's lifetime was the same way which is now claimed: *Lyell v. Lord Hothfield*, [1914] 3 K.B. 911.

App. Div.
1917

BALDWIN
v.
O'BRIEN.

W. N. Tilley, K.C., and Strachan Johnston, K.C., for the defendants *O'Brien, McLean, and Verral*, respondents. The judgment appealed from is right, and should be sustained. When Miss Willcocks devised lot 7 and lot 8, she gave to the devisee of lot 8, as appurtenant to that lot, the right of way over lot 7 that had been used by the occupant of lot 8 in her lifetime: *Phillips v. Low*, [1892] 1 Ch. 47; *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165. The evidence, documentary and otherwise, shews that there was dedication, as found by the learned trial Judge, and the constant subsequent user by the public strengthens the other evidence, and shews acceptance by the municipality. When we shew this long user as a way, it is for the plaintiffs to shew that Miss Willcocks did not intend to dedicate. We have the right to claim a public highway, or, in the alternative, a private way with a prescriptive right over it: *Palk v. Skinner* (1852),

App. Div.
1917

BALDWIN
v.

O'BRIEN.

18 Q.B. 568; *Earl De La Warr v. Miles* (1881), 17 Ch. D. 535, at p. 591; *Ker v. Little* (1898), 25 A.R. 387; Gale's Law of Easements, 8th ed., p. 22; *Reed v. Jackson* (1801), 1 East 355. We also rely on *Neill v. Duke of Devonshire* (1882), 8 App. Cas. 135. And this we claim originally under the will of Miss Willcocks. Though no such right was expressly devised by her with lot 8, that right of way went with it as something appurtenant to it. We also contend that the plaintiffs' right of action is barred by the Statute of Limitations: Goddard's Law of Easements, 6th ed., p. 266; *Wakefield Corporation v. Cooke*, [1904] A.C. 31. Finally, we claim by lost grant: *Watson v. Jackson* (1914), 31 O.L.R. 481.

J. A. Paterson, K.C., for the defendants the North American Life Assurance Company, respondents, asked the protection of the Court as to costs.

Armour, in reply.

June 8. MEREDITH, C.J.C.P.:—Notwithstanding the great length of time taken up in the trial of this case, as well as in the hearing of this appeal, the substantial matters involved in it come within a reasonably narrow compass and involve no questions but those of the ordinary character.

Substantially, the plaintiffs' action is for trespass to lands; and the defences set up at the trial were: a denial of the plaintiffs' title, in an assertion that the place in question is a highway; and that, if not, the defendants had a right to do the things complained of under a devise, or a lost grant, or by reason of the provisions of the Statute of Limitations.

The first defence rests upon an alleged dedication of the land in question, by an early owner of it, as a public highway, and an acceptance, in law and fact, of that dedication. But I am unable to find any kind of evidence of such dedication, or of any thought of dedication, on that owner's part.

The land in question was, in that owner's lifetime and at the time of her death, described as being: part of a block of land, of 6 acres, in that part of the town of York "denominated the new town," owned by her in fee simple. In one of the writings, said to have been made in her lifetime, but to which she was not a party, nor in which, is it made to appear, she was in any way concerned, the land is thus particularly described: "Lots 6, 7, and 8,

in King street in the new town of York aforesaid, containing by admeasurement 6 acres more or less;" and in this writing there is a provision that the whole of the land be fenced in together as one lot, with a good board-fence along its outside boundary-lines, before the expiration of the term created by it; and, beside that fencing, the rent was only 5 shillings a year. So that the land was of that character which, even in these days, would be assessed as "farm land."

The writing is a lease, for four years, made by one Baldwin, who under the owner's will afterwards became one of the life-tenants of lot 7; and there is not a word in it connecting the owner of the land with it in the remotest manner; but there is a recital indicating that Baldwin had subdivided the block of land into 36 building lots, to be let or sold at his will or discretion.

Except the will of the owner, there is only one other writing filed that purports to point to anything affecting the land done in the lifetime of that owner. It is a copy of a grantee's memorial, for registration, of a mortgage of a leasehold term, the mortgage being dated in November, 1839, and made between James Thomas and John Bishop, persons who appear to be now unknown, and who do not appear to have had any other interest in, or connection with, the land or its title. The term is described as one of 21 years, of which 8 had expired, of lot "G," according to Baldwin's plan, the metes and bounds being given, the easterly limit being on a reservation for a lane, not an existing lane: but there is no assertion in it that this description was contained in the lease; it may or may not have been.

Upon this flimsy material, if indeed material it can be called, the respondents have built up the fantastic story that Baldwin, with the consent of the owner, who was his wife's sister, had laid out a city building plan, with a highway about 12 feet in width, not in the middle of the block of land owned by her, and still further from the middle of the block between the two highways that bound it on the east and west, the rest of which northward was not owned by her, but only a quarter of the distance, between those highways, measured from the west end of the block.

To reach this conclusion, it is said that Baldwin himself, in his lease, misstated the way in which his lots were numbered; that this can be gathered inferentially from what the mortgagee

App. Div.
1917

BALDWIN

v.

O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN

v.

O'BRIEN.

Meredith,
C.J.C.P.

of the Thomas Bishop mortgage said in his memorial for registration of the mortgage, and by making necessary allowances in measurement to meet the needs of the story; and that therefore there must have been a reservation for a lane near the place in question, not a lane in fact; and that, because a sister of the owner in fee was married to the man who made the diagram, it would be proper for a jury, on their oaths, to find that the owner knew of the lane, and that she intended to dedicate it, and did dedicate it, as a highway. But a score of more plausible stories could be made up from the same facts.

Why assume that there could have been but one reservation for a lane in an otherwise closed frontage of about 630 feet on the front street, and then endeavour to put one in at the place in question? The first two plans that I have now placed my hands on, shew some greater abundance of lanes: one dated the 27th July, 1874, shews two lanes 12 feet wide on a space less than one-quarter of one of these 6 lots that composed the subdivided block of land—all within the one fence; the other, dated the 28th May, 1889, covering the same piece of land, lot 8 on King street, shews neither of these lanes, but does shew another lane running through the middle of the lot from west to east. I suppose that, if the original lots had been numbered from west to east, instead of east to west, as they were, that too would be advanced as a convincing piece of evidence that Baldwin did not know which way they were numbered, or misstated that which he knew, when in his lease he stated that in his diagram the lots were lettered A to S, from east to west; and also proof of a way given to the public by his sister-in-law in her lifetime. Are property-rights to be taken away in that fashion?

It ought not to be necessary to give instances of other plausible stories which may be constructed out of these circumstances, because they are obvious; but even the obvious is sometimes denied by those whose purpose it does not suit; so it may be worth while taking up the time necessary in giving an instance or two. Let us, instead of jumping to the conclusion that Baldwin, who should have known best, and was most interested, was either ignorant enough not to know, or was stupid enough to misstate, how his lots were numbered, or ignorant as to the points of the compass, take the very much shorter step to a conclusion that a

simple error as to east and west—as to the lay of the land—was made in the Thomas-Bishop writing, a writing made many years after the diagram was made, and made in respect of a matter of extremely insignificant importance compared with Baldwin's interests; and thus there would be no contradiction of Baldwin, and the reservation for a lane would be in the centre of the block, on the east side of lot lettered G and west side of lot 6, the most likely place, instead of being only one lot's width from York street, where it would be much less needed, especially if reserved for highway purposes; and all the learned trial Judge's allowances for "overrunning," etc., would fit in, in precisely the same way, in "proof" of the reservation being on the westerly side of lot 6 instead of lot 7. Again, why not imagine two lanes? It is quite as easy as to imagine one only, and does not make Baldwin out any the more ignorant or stupid. A lane between each pair of lots would assuredly be more reasonable than one lane only, and that one away over towards York street. Two lanes, there, would give one in the middle of the whole block, and the other half-way between it and York street; and, according to the trial Judge's method of estimating the frontage on King street, would fit in with that frontage in a rather precise manner, allowing two lanes of 9 feet each, if no "overrunning;" 10 feet if "overrunning" of 2 feet only; 12 feet if "overrunning" of 6 feet; and so on. I said a score of more plausible stories, but perhaps that was an underestimation.

But why imagine any reservations for a lane in Baldwin's diagram? Indeed what excuse for it? Lanes afterwards sprang into existence as they were needed; every subsequent plan I have seen shews one or more of them. Why must the reservation for a lane, if there actually were the one referred to in the Thomas-Bishop leasehold mortgage memorial made in 1839, have been made in the Baldwin diagram, which was made before 1819? There is no evidence of there having been any reservation for a highway, lane, or any other way, from King street, in that diagram; the contrary clearly appears. The whole front was divided up into lots. There was no need for any such way, because each lot ran back to a wide commodious way, running from east to west across this block of land, half-way between King and Adelaide streets, affording the amplest of back entrance accommoda-

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

tion for every lot. It was only when that way evolved into a highway of the city of Toronto, repaired, paved, cleaned, etc., by the municipality, and the land fronting upon it was, or was to be, sold and built upon, that lanes and other means of private back, or side, entrance became necessary and were laid out; and the mere fact that this broad lane evolved into a highway with names changing from Broad lane to Boulton street and then to Pearl street, and that there has been no evolution of the lane in question, or any one of the several others in the block, but it is still stuck in the mud of its earliest days, ought, I should have thought, to condemn, in itself, the conclusion that it is, and has been for about a hundred years, a highway for the use of all Their Majesties' liege subjects who have lived in that time; and subject to the control of, and reparation by, the public authorities.

The other writing, the will of the owner, is altogether against any contention that she was connected in any way with the diagram, or had given to the public, or to any one else, any part of her block of land, devising, as it does, the original lots 7 and 8 — those involved in this case — as such lots intact and unincumbered; and, as she gave lot 7, out of which it is said she had already given this highway, to Baldwin and his wife, her sister, for their lives, it is not a very long step in imagination to account for Baldwin, in her lifetime, acting as if those life-estates had already been given or promised.

I am not overlooking the fact that it is said that some one, at a trial of another action forty years ago, testified that the lane in question was in existence at a time when the owner of the land was alive; but no kind of attempt was made in this action to prove that any such evidence was given, and, if it had been, it ought not to have been allowed. The last we know, in any direct way, regarding it, is that Baldwin had contracted for the fencing of the whole block with a board-fence by the 18th May, 1823.

But, assuming that it was proved that the owner herself not only made a reservation for a lane, but actually laid it out, and that it was used in her lifetime, what is there in that proving it to have been dedicated by her, or by any one, to the public as a highway? Or, indeed, what has happened, since her death, down to the present time, inconsistent with its being a private lane, or to indicate that it was ever meant to be a highway?

In those days when land was abundant, to spare and idle, or even in these days when, at the place in question, it is closely occupied, who in his sane senses could have thought, or could think, of laying out a highway 12 feet in width, or, if he did, would be permitted to carry the thought into effect? The law has long provided for highways being generally 66 feet in width, and down to the present session of the Legislature, has been getting more and more stringent in that respect.

That a highway in the middle of the whole block would be very useful now is evident, and, if laid out by Baldwin, might in after years have proved profitable. But a highway only 12 feet in width, far removed from the centre of the block, in the newly-added district of the town of York, or even in the city of Toronto, can only have an origin, such as most "lost grants" had, in imagination known to be contrary to the truth. And it is quite evident that in early days no need of such additional highways was felt. The block opposite this one has no such way, nor the block next to the east of it, nor has that next to the east again, until recently the municipality continued Victoria street through to King street and further; and these last two mentioned blocks are in the very heart of the business centre of Toronto—at the corner of King and Yonge streets.

Though lanes innumerable exist, to the knowledge of all of us, in Toronto, several in this very block, besides those which I have mentioned, and which have now disappeared, the mind of none concerned in this appeal, knowledgable about Toronto as nearly all must have been, could tell of a single *public* lane in the whole city except one, and that one, Leader lane, at least half as wide again as this lane; and, as far back as the memory of any of us went, a public lane, controlled and repaired and lighted and cleaned and watered and police-patrolled by the municipality; paved in the centre for horses and vehicles, with raised cement sidewalks on each side; and with shops and offices, continuous, along one side; a lane affording the strongest evidence of the private ownership and character of that in question.

Though, if a highway, the municipality has been for 67 years past entitled to assume, and in the interests of public health and morality should have assumed, the common highway obligation to keep this lane in repair, yet not a farthing has been expended

App. Div.
1917

BALDWIN
?
O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

upon it out of the public funds for repair, lighting, watering, cleaning, or patrolling, but it has been from first to last and still is treated as private property in these respects. The appellants, though in no way liable, have been doing this public work as well as paying their taxes. The lane has been fenced all along one side of it, and at one end, at times. Iron gates have been erected and maintained for years, and still are, at the other end—all these things being indictable offences if the way be a public one. But there has not been a suggestion of any prosecution for any of these, or like offences, by the Attorney-General, by the municipality, or by any one of the public. There has been litigation, contention and bickering, for years, on the part of persons making private claims, and attempts such as this, but always only for private purposes and gains.

The mere fact that the land has ever been, since the year 1834, nearly always subject to life-estates and terms of years, does not, of course, make it impossible that there could have been a dedication in that time: see *Farquhar v. Newbury Rural District Council*, [1908] 2 Ch. 586; but it does make it much more improbable, and difficult to prove; hence, doubtless, the laboured efforts to fasten the dedication upon the owner in fee prior to that time. But that fact is one of much importance, and one to be borne in mind in considering the evidence as to dedication to, as well as to acceptance of the dedication by, the public at large. In this case the tenants would have been quite within their rights in building shanties, rinks, etc., upon lot 7, and making use of the westerly 12 feet as a way through or to or from these erections or any part of the lot, and indeed to or from lot 8, or generally. The head landlord would not interfere, nor could he interfere with any one using it under the pretence of it being a public way; that could not grow into a legal right, as it might if used as a private way.

And against all this, what is there? An assertion on the part of the respondents that the public for many years made use of the way and some evidence of unmolested use of it given by some of their witnesses, use on foot mainly. Indeed, if the woman who is said to have made a highway of this narrow strip of land, with a decided jog in it in the middle of the block, north and south, made it with the intention that it should be both a foot and car-

riage public way, there might be grave doubts about her sanity. That it was intended for waggons is obvious; if it should be closed, the only real deprivation the defendants could suffer, apart from want of light, is the means of taking waggon loads of fuel and other large and heavy materials to their property by the back way; and so too it would be for all who really have any interest in it, or have shewn any desire that it should be kept open.

But in regard to this contention and these witnesses, I feel bound to say that a very narrow conception of the meaning of the expression "dedication to the public" has prevailed. All questions of state were not determined in Tooley street, nor does the expression, or imagination, that "We are the people," carry much weight. The evidence really amounts to this, that a number of persons in the vicinity made use of the lane when it suited their convenience. And why not, in this country, as much as if it were private property as public? Why should, or why would, any one interfere with them? Why not, as it is said even in England, tolerance instead of churlishness? See *Rowley v. Tottenham Urban District Council*, [1914] A.C. 95; *Maccomb v. Town of Welland*, 13 O.L.R. 335, at pp. 339, 340; and *Hunter v. Richards* (1913), 28 O.L.R. 267, at p. 270, 12 D.L.R. 503. There is not a single instance given in evidence, until later days, of the kind of use that challenged objection, that was inconsistent with tolerance, or in which it would not have been churlishness, according to notions which have generally prevailed here, if convenient passage that way had been prevented or objected to.

And, in passing, I may point out that one of these witnesses stated that his reason for going that way was to avoid annoyances which he was sometimes put to on the public streets. A dedication to the public is a very wide gift. A gift to the inhabitants of a locality or of a municipality, only, would not be wide enough. This must always be borne in mind. Neither the inhabitants of Tooley street, nor of a whole locality, can in themselves alone accept a dedication for the public with all its consequences, transferring the title to, and imposing great obligations and liability upon, the municipality, if accepted by it. The mere fact that the municipality has done nothing to the lane goes a long way towards disproving the assertion that it was dedicated, or, if dedicated, accepted. The Board of Works, roadmasters and

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

others, of the municipality, rather than such witnesses as were called to prove acceptance, should know most regarding these things, and their want of action is the strongest evidence against acceptance and dedication:

In the face of all this, we are asked by those upon whom the onus of proof lies to find that some one, having the power to do so, dedicated this land to the public, and that it was accepted by them so that it became and is a highway which the municipality could assume so that the freehold would be vested in the City of Toronto, with a right of way over it in the public, a right of way which that municipality would be bound to keep in repair, and in default would be liable for all damages sustained by reason of such default; and to do that in the absence, and behind the backs, of the municipality and of the public. Need I add that I firmly decline to do so? I find no reasonable evidence of dedication in the acts of this limited area public, if public they may be called, nor of any power in them to accept for the public, nor of any acceptance for the public, if they could bind the public by any acceptance. If the way were a highway, there could be no doubt that the municipality would have assumed control over it. It could not have been left unrepaired, unlighted, and uncared for, in the heart of the city. And, if a highway, why would the appellants repair and take care of it as they have done?

And in dealing with questions such as this, the different conditions here from those in England, and other places, must always be borne in mind; for an instance, the fact that until recent years, and in many places yet, owners of land more than tolerated freedom to all to hunt and to fish; that the worst the trespasser was likely to suffer would be an invitation to dine or to sup with the owner, and the worst that the owner would reciprocally suffer was a pressing invitation to have something from the sportsman's flask or bottle; and, for another instance, let me point out, that most highways in England are created by dedication, and but very few indeed are here. That all lands here have been first surveyed and laid out with allowances for road sufficient for all purposes until subdivisions become necessary for, or in addition to, towns and villages, and then such subdivisions are made with sufficient roads shewn upon registered plans of them. There is little need for dedication; it has never come into fashion.

I should add that I have accepted as evidence, properly adduced in the respondents' favour, the judgment in the former action to which I have already referred. That judgment was given in an action between two tenants for years, in which the one sought to prevent the other from obstructing access to the land which is now the respondents', by means of the lane in question, as a highway, or else as a private way. It was contended that that judgment was conclusive as to the character of the way; but, as none but those two tenants were concerned in that action, such a contention is too obviously erroneous to waste any words over it. But this case being one in which the main question heretofore dealt with has been, whether the place in question is a highway, and as that sort of hearsay evidence which is called "reputation" evidence might be given in it, that sort of secondary evidence which such a judgment, or a verdict of a jury, may afford, might be given for what it might be worth, obviously little in a case such as this, where the whole facts have been brought out at such great length, and so much more fully than in that case; so that, unless we are to surrender our judgments, and so really not try this case, that judgment cannot have much weight. We must not let it take effect as an estoppel or partial estoppel.

In the case so much relied upon by the respondents—*Neill v. Duke of Devonshire*, 8 App. Cas. 135 — ancient rights running back to a time before Magna Charta were in question. The trial took place in 1878, the decree which was considered to carry weight, in regard to the facts upon which it was based, was made nearly two hundred years before, in a Court of Chancery in Ireland in what were called possessory proceedings, proceedings in which that Court had not jurisdiction unless there had been continuous, unbroken, clear and unequivocal user and possession for three years before the filing of the bill, and a predecessor in title of the plaintiff in the action in 1878 had been the plaintiff in the possessory proceedings.

In these circumstances, *and there being no evidence to the contrary*, it is not to be wondered at that that decree was held to be evidence of considerable weight in proving that the plaintiff's predecessor in title had been in such possession at that time, the

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

wonder would be if it had not been so considered. Lord Blackburn dealt with the matter thus (pp. 185, 186): "My reasons for thinking it," the decree, "admissible are that, though the general rule of the law of evidence is to exclude hearsay evidence, yet where the point to be proved is ancient possession before the time of living memory there is a wide class of exceptions, grounded on this; that there being no possibility of producing living witnesses to testify as to things that happened so long ago, the matter must remain unproved, unless the best evidence of which, from the nature of the thing, can be produced, be received. And where the question is one of public interest, which the question whether the public were entitled to fish in a tidal river or were excluded from it clearly is, evidence of reputation is admissible. The evidence afforded by a record shewing that a Court of competent jurisdiction inquired into and pronounced upon the state of facts, and the question of usage at a time before living memory, is perhaps not properly evidence of reputation that the state of facts and the usage at that time were as there pronounced to be. But it is as strong or stronger than reputation, and the authorities are agreed that it is admissible, at least in cases where reputation would be admissible."

I do not quote these words as enunciating the whole law upon the subject, but to shew from them the character of the case then being considered, and the facts regarding which those words were used, how very widely different that case was from such a case as this, in which there was no reputation evidence; there was no need of it, the facts are all before us upon which such reputation could alone be proved; so that, though a recent judgment may apparently be given in evidence: see *Earl of Carnarvon v. Villebois* (1844), 13 M. & W. 313; what help can it be in such a case as this?

And, before parting with the subject, I should, perhaps, point to the improper form in which the judgment in question seems to have been signed, many years after the learned Judge who tried the case had ceased to be a Judge of the Province and to reside in Toronto. I refer to that part of it dealing with the rights of the public. The Court had power to award to the plaintiff any private rights he may have had, including a right of access to his property, but had no power to deal with any right which he had

as one of the public, much less to deal with the rights of the public. The judgment-clerks should take greater care in entering judgments.

I must now add an expression of my regret that so much time has been taken up in that which I have expressed, as well as throughout this case, with more or less irrelevant matters, owing largely, no doubt, to the earnestness and unflagging energy of counsel in leaving no stone unturned under which by any stretch of imagination it might be thought something favourable might be found; for, borrowing the words of a recent Lord Chancellor: in my view this case must be determined on a broad view, and the subordinate details which fill so large a part of the material before this Court have little weight with me. The broad view makes it very plain to me that the lane in question never was, and never was intended to be, a highway; a highway for horses and waggons as well as those on foot; with the right to build upon both sides of it, with rights of access, light, and air; as it must be if a highway at all; and that it is not a highway a view of it ought to convince any one who is not so convinced by all that has been heard in Court.

But, as the learned trial Judge, after a trial which seems to have extended over eight days on three different occasions between the months of September, 1915, and June, 1916, expressed his views at length in writing, it is right that I should refer to them, and should state as to each of his findings the reason why I am unable to agree with him.

Differing in this from the Judge who tried the tenants' case, he found that the lane was dedicated to the public as a highway before the year 1832; but his reasons for that finding seem to me to shew that there could have been no dedication such as his reasons deal with, before that year; for Baldwin, to whose acts alone he refers, admittedly had no power to dedicate until long after that time; the whole of the land having been the property of his sister-in-law until she died; and after that, until the year 1845, his only interest in the land in question was that of one of two life-tenants. The learned Judge's findings are set out in the thirteenth page of his reasons, and there is nothing in them there to indicate any kind of intention to find that the owner of the land dedicated the way in question. There is not a tittle of

App. Div.
1917

BALDWIN

v.

O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN

v.

O'BRIEN.

Meredith,
C.J.C.P.

evidence that she did, or ever had any thought of doing so; the contrary is shewn by her will, and, as I think, by every fact connected with the case, and by the extreme improbability of creating, in the circumstances, a 12-foot highway for all the subjects of the realm: the practical certainty, in such circumstances, that such a lane was for the use and convenience of Baldwin's tenants; just as the trial Judge in the tenants' case is said to have found in these words: "specially dedicated . . . for the convenience, use, and enjoyment of the lessees and owners . . .;" a finding which seems to me to be inconsistent with, and destructive of, a finding of dedication to the public, for in such a case the dedication must be to all alike: see *Poole v. Huskinson*, 11 M. & W. 827.

What the learned trial Judge in this case really found as a fact was: that the lane in question was originally set out in the diagram which the lease from Baldwin to the carpenter shews Baldwin had made of his sister-in-law's lots 7 and 8 and the rest of the block of land of 6 acres, though no lanes are mentioned in that lease, and if there were any they were to be enclosed in the board-fence to be built all around the block of land. Nor is there to be found anywhere any evidence, except such as this lease affords, of what that diagram was or what it contained, though it is referred to in some later writings. But, as I have said, the lease shews that there was no lane from King street. However, if there had been one at the place in question, that would be no proof of a highway. As I have already said, the first two plans that came to my hand, shew three lanes, beside that in question, in, and adjoining, lot 8. And the manner in which the trial Judge reached the conclusion that there was, on this diagram, a lane at the place where the lane in question is, seems to me to be quite inconclusive. He took the memorial of the Thomas to Bishop mortgage, as it is called, of a short term of years, made in 1839, a transaction as to which, and as to the parties to it, there seems to be no evidence, or knowledge, beyond that which the writing conveys; he took this as the foundation upon which the finding is built, and, finding that the description of the lands contained in it shews that a lot lettered "G" was west of a lot lettered "H," and that there was a reservation for a lane, not a lane on the west side of letter "G," he concluded that

Baldwin misstated, in the recital in the lease to the carpenter, the way in which the lots upon his diagram were lettered, that really they were lettered the opposite way; then numbering from west to east, and, attributing to some other mistake or mistakes a discrepancy of several feet, put the "reservation for a lane" where the lane now in question is; thinking that he was aided in doing so by a writing made years afterwards, a lease, from "one Boulton to one Barnard," in which a lot "A" is described as being on the corner of Adelaide and York streets and having a frontage of 38 feet, not 34, as Baldwin in the carpenter's lease had said they all had. Baldwin's diagram may have been changed, or departed from, to suit circumstances as they arose; and other plans were from time to time made, and some of them registered. In neither of the two registered plans now before me does any one of the lots retain its original width of 34 feet, nor is any one of them 38 feet. And, as shewing how easily any one may make a fatal slip in such methods, even the learned Judge, after quoting from Baldwin's lease the recital that the lots in the diagram, "now exhibited to the parties hereto at the time of the execution hereof," were lettered from east to west with the letters A to S, goes on to say that this would give 18 lots on each street, which, at 34 feet each, would make a total of 612, and that would be 18 feet less than the frontage of the 6 lots comprised in the diagram, part of which 18 feet could be appropriated to this lane, "though the lease contained no reference to the lane." But, if "A" to "S" be 19 instead of 18, there would be a shortage of 16 feet, instead of 18 feet too much, a shortage which might be accounted for in the "overrunning" of the actual frontage of the original lots, which the learned Judge says he has no doubt there was. At all events there would be nothing out of which an allowance for a lane could be made. In the Baldwin lease, although the lots are said to be numbered "A" to "S," and so must have included "S," as they included "A," they are also said to be in all 36, one-half of which, no doubt, the learned Judge accepted as the number on King street. I mention this merely to shew how frail must be the foundation upon which this finding is built up.

But, again, of what real importance can it be? There is, and for very many years has been, a lane at the place in question; if a public lane in public use, repair, municipal control, etc., there

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

would be quite enough evidence to warrant a finding of dedication by Baldwin, which would be enough; but none, of any kind of dedication, or intention to dedicate, on the part of his sister-in-law. There is nothing whatever, except their connection by marriage, which sometimes has the opposite effect, to connect her with his subdivision scheme or diagram. Everything proved, with perhaps one exception, relates to him alone, leases, provision for leasing and selling, and all else; and that might well be, seeing that his wife and he were to become life-tenants of the land.

This brings us to another finding, or rather statement, of the learned trial Judge—the statement upon which he really and finally bases his judgment in the respondents' favour.

In the year 1866, the Passmore plan was made; and the learned Judge said, as to it, that it was signed not only by the representatives of Miss Baldwin, "whose estate is being laid out, but also by W. A. Baldwin, who was not only a trustee with respect to these lands but the life-tenant under his own settlement of lot number 7;" and that, as the streets and lane were shewn in the same colour on it, that went to "shew that they were at that date recognised as constituting public highways." And in his conclusions he adds that W. A. Baldwin "expressly assented to the representation of this lane as a highway;" that is, in signing the plan: and so it was proved to be a highway.

But how does that plan become evidence against the owners of lot 7? A plan made for the owners of lot 8. It would be a very easy way of acquiring another man's property if it did. And how does it go to shew that this lane was at that date recognised as being a highway? Surely, if at all, only to the extent of being so recognised by the owners of lot 8, for whom, and of whose lot only, it was made. Reputation had nothing to do with its construction: it merely shews how the land, and its surroundings, were seen through the eyes of a surveyor employed and paid by the owners of lot 8 and acting in their instance. How far from being evidence of that character, such cases as *Attorney-General v. Horner*, [1913] 2 Ch. 140, shew.

But how can it be said that this plan in any sense shews that any one thought, or intended to convey any impression, that this lane was then, or at any time, a "public highway?"

It is a rather crude and inexpensive plan, much as the two I

have before referred to are, and such as are commonly made for any purpose or use, temporary or otherwise. It is, as is commonly done, crudely coloured in two colours, the one shewing the land laid out, or in reference to which it is made, in a brighter colour; and the surrounding property in a duller colour, so as to bring to the eye quickly and clearly the outlines of that which is laid out, or is otherwise of importance. To lay out land, or to shew upon a plan lands laid out for any practical purposes, it is necessary to shew to some extent the surrounding land. The draftsman of this plan used a pink colour to indicate the land in which his employers were concerned, and a brown colour—if it can be indeed called anything more than a dirty wash—for the surrounding property; nothing more than that. Properly, indeed necessarily, it was shewn, upon the plan, that the owners' land, lot 8, was bounded on the south by King street, the main street of Toronto then, on the west by York street, an important street also, on the north by Boulton street, and on the east by the lane in question; all of these boundaries are of course coloured with the darker wash; but what else would they be coloured with? And this it is said is a representation of this lane as a highway, and as going to shew that when the plan was made this lane was recognised as constituting a highway. That is to say, that, if the draftsman had not thought so he would have made a three-coloured plan, and have shewn the lane in a third colour; and that, if he had not, those who signed it would have required it to be done.

If there was nothing more to be said on the subject, I would have no hesitation in saying that no conclusion whatever of that character should, or could, be drawn from the two-colour work. But there is a great deal more to be said against it. The draftsman in plain letters told what all this surrounding property was, in words which no one could mistake, "King street," "York street," and "Boulton street," all wide and well-known streets; and the 12-foot strip in question he plainly labelled "Lane," very plainly distinguishing the highways from this lane. I am obliged to repeat the observation, that the respondents must be indeed hard pressed in being obliged to rest upon such things as this plan as proof that this narrow strip is a highway. And I may add that, in again taking up the two plans at my hand, to which I have more than once before referred, I find each to be just as

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

this plan is, the land marked in pink, and roads and lanes all alike in colour, or without colour. So that, by this method of reasoning, the private lanes shewn on these plans are proved to be highways, though marked lanes, and though the highways are named as streets by their well-known names, and no one ever suggested, or could reasonably suggest, that the lanes are highways.

The next defence is: that it is not a highway, but is a private lane, over which the defendants have a right of way, with access to their land.

After taking so many days to prove that this is not so, it is very inconsistent to turn around and contend that it is so; but I do not see why it is not open to the respondents to do so.

What they say is, that at the time of the first owner's death the lane existed, and that a tenant of that part of lot 8, which they now own, had, under the owner, the use and benefit of such a way and means of access, and that, though no such right was expressly devised with lot 8, that right of way and right of access went with it as something appurtenant to it. All being things easy to imagine, and, upon such imagination, to bring within some indisputable law or under the authority of some well-decided case.

But fanciful pictures will not do; there must be proof, and there is no proof of any such occupancy at the time of the woman's death or in her lifetime. It is said that a witness swore to it in the tenants' action; but no attempt has been made to prove that; nor could it be proved; for, though the witness be dead, the plaintiffs were not parties to that action; and it would be absurd to say that it would be admissible as "reputation" evidence; the witness testified to facts, not repute; and testified not only *post litem motam*, but at the trial of an action in which the very question was being tried.

If, however, all that were proved, how could it help this defence? The only right of way and access that could have been had was one lasting for the term of years which the tenant had, and which came to an end with its determination, however brought about; why should the owner of the land intend to turn a temporary use into a permanent condition in regard to property which is unlikely to need, when differently occupied, any such way

or access? And, again, the right was of passage over the way and into this part of lot 8 as given to and enjoyed by the tenant; a passage which passed away with the tenancy and has been entirely obliterated, so that no one can tell where or what it actually was.

Then, with further inconsistency, the respondents urge that not only was there no highway but there is no expressed grant, and that they hold under a lost grant; although there is no room in reason for any such contention. The whole history of, and devolution of estates in, the land are known; and, if this were not so, how could it be said that the respondents have enjoyed the rights they claim as of right *nec vi, nec clam, nec precario*? A lost grant may be presumed when the way as of right has no other reasonable explanation: here it is fully explained as a use as a public right which it turns out did not exist.

And this brings me to the last line of defence: that is, that the plaintiffs' right of action is barred by sec. 35 of the Limitations Act.

Ever since the building now occupied by the respondents was erected, they, and those through whom they claim, have had the full enjoyment of all the light that this lane enables them to obtain through the existing windows on that side of the building; and they have had a door in the building giving access to it from the lane, as well as some means of access from the lane to their yard, and seem to have made use of these means of access to and from the public streets, by way of this lane, whenever they chose to do so, except when the iron gates at the south end of it were locked. But the actual extent and character of that use of the lane is very indefinitely shewn.

I am, however, unable to perceive how the respondents can well defend this last ditch.

The statute requires that the right shall be actually enjoyed by a person claiming right thereto; and claiming right thereto means claiming a private right, not a right as one of the public; and the enjoyment must have been for twenty years next before the time of the commencement of this action.

It is quite plain that no such enjoyment has been had, of any definite or indefinite right of way or access. For that length of time, and indeed ever since the trial of the tenants' case at the

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Meredith,
C.J.C.P.

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Meredith,
C.J.C.P.

least, any and all such rights have been exercised as of one of the public having land fronting on a highway; and the highway defence failing, the lost grant and prescriptive right defence must fail also.

I would allow the appeal and give judgment for the plaintiffs in the action, with nominal damages and costs on the Supreme Court scale, without set-off. Nothing more than that seems to be needed.

MAGEE, J.A., agreed with the Chief Justice.

LENNOX, J., agreed that the judgment should be as stated by the Chief Justice.

ROSE, J.:—The contest in this case is as to the right of the defendants, the owners and tenants of lots 4 and 5, part of town-lot No. 8 on the north side of King street in Toronto, to use a lane running north from King street to Pearl street immediately to the east of this property, such lane being the westerly 12 or 13 feet of town-lot No. 7, owned by the plaintiffs.

On the property of the defendants is the building known as No. 120 King street west, its east wall being at least as far east as the east limit of town lot No. 8.

On the property of the defendants is the North American Life building, its west wall being 13 feet east of the west limit of town-lot No. 7. The space between these two buildings is the southerly end of the lane in question, the lane extending, as has been stated, to Pearl street.

The defendants broke down gates placed by the plaintiffs across the lane at the King street end, and this action was brought for a declaration of the plaintiffs' title, an injunction, and a mandatory order that the defendants restore the gates. The defendants plead: (1) that the lane in question is a public highway; and, alternatively, (2) that they have a right of way over the lane under a devise, or a lost grant, or by prescription.

After a long trial before Mr. Justice Middleton, in the course of which nearly 50 witnesses were examined, that learned Judge decided in favour of the defendants upon their plea that the lane is a public highway. Holding the view that the highway had

been established, he did not find it necessary to consider the other grounds of defence set up.

The land bounded on the south by King street, on the north by Adelaide street, on the east by Bay street, and on the west by York street, was originally laid out in eight lots, four in King street and four in Adelaide street, each being supposed to have a frontage of 3 chains and 17 links (209 feet $2\frac{3}{4}$ inches), and each being supposed to contain one acre. The westerly 6 of these lots—including lots 7 and 8—became vested in Susanna Maria Willcocks, who died in 1834. It is she who, according to the finding of the trial Judge, dedicated the strip in question as a public highway, the dedication, according to the finding, having taken place some time prior to 1832.

Miss Willcocks by her will, made and admitted to probate in 1834, devised all her lands to William Warren Baldwin and his wife, her sister, Margaret Phoebe Baldwin, and the survivor of them for life. After the death of the survivor of those life-tenants of the whole of her lands, lot No. 8 was devised to Robert Baldwin and Augusta Elizabeth Baldwin, his wife, and the survivor of them for life, and, upon the death of such survivor, to trustees for Phoebe Maria Baldwin (daughter of Robert Baldwin) for her life, and upon her death in case she should die intestate and without children surviving (which event happened) to her right heirs in fee. Lot No. 7, after the death of the survivor of the life-tenants of the whole of Miss Willcocks's land, was devised to William Augustus Baldwin (nephew of the testatrix) in fee.

The dates of the deaths of the several life-tenants and of the division of lot No. 8 amongst the heirs of Phoebe Maria Baldwin are stated by Mr. Justice Middleton, and it is unnecessary to repeat his statement. What is to be borne in mind in considering the evidence hereinafter discussed is, that the common ownership in fee of the two lots 7 and 8 came to an end in 1834; that from 1834 until 1845 lot No. 7 was held by life-tenants; and that in 1852 William Augustus Baldwin, in whom that lot became vested in fee in 1845, conveyed it to the trustees of his marriage settlement, reserving to himself a life-estate with the power to grant leases for terms not exceeding twenty-one years. I do not think it appears in evidence whether William Augustus Baldwin granted any leases of lot 7 earlier than 1858; but from 1868 onward, as

App. Div.
1917

BALDWIN

v.

O'BRIEN.

Rose, J.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Rose, J.

pointed out by Mr. Justice Middleton, the lot has been under long leases.

At this late date, there is of course no parol evidence of the condition of the land in the lifetime of Miss Willcocks, and there is no direct evidence, documentary or otherwise, that she dedicated or intended to dedicate the strip of land in question to the public for a highway; the dedication which the trial Judge finds being inferred from certain documents, to which I shall refer, and from the use that has been made of the land from 1842 onwards. I think that is the earliest year of which any witness speaks.

In examining the evidence it is necessary to keep in mind that "the onus of shewing dedication was upon the defendants The soil and freeholds having been shewn to be vested in the plaintiffs, it was incumbent on the defendants to shew clearly and beyond any reasonable doubt that the plaintiffs' ownership had become subject to a right in the public, the question being whether, as against the plaintiffs, there was sufficient evidence of an intention on the part of the owners of the soil to dedicate the land to the public as a highway:" *Maccomb v. Town of Welland*, 13 O.L.R. 335, *per Moss*, C.J.O., at p. 339; and, I may add, sufficient evidence of acceptance by the public: *Pratt and MacKenzie on Highways*, 16th ed., p. 17. And, further, it must be remembered that "there may be a dedication to the public for a limited purpose, as for a foot-way, horse-way or drift-way; but there cannot be a dedication to a limited part of the public In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate; there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment:" *Poole v. Huskinson*, 11 M. & W. 827; *Mann v. Brodie*, 10 App. Cas. 378, at p. 386.

"In most of these cases dedication . . . is proved by user. But user is but the evidence to prove dedication: it is not user, but dedication, which constitutes the highway; therefore, what always has to be investigated is whether the owner of the soil did or did not dedicate certain land to the use of the public: *Attorney-General v. Esher Linoleum Co. Limited*, [1901] 2 Ch. 647, 650.

Turning now to consider the direct evidence as to dealings with the land in the time of Miss Willcocks, we find that it consists of four documents, two of them dated in the lifetime of Miss Willcocks and two dated after her death. They are: a lease made by William Warren Baldwin to Josiah Cushman, dated the 27th May, 1819; Miss Willcocks's will, dated the 29th May, 1834; a mortgage, Thomas to Bishop, dated the 18th November, 1839; and an assignment dated the 31st July, 1857, from James Boulton to Hiram Goodwin Barnard, of a lease from William Warren Baldwin and others to Charles Northcott, recited in the assignment as dated the 8th August, 1840. While the mortgage and the assignment of lease were not made in the lifetime of Miss Willcocks, the learned trial Judge attaches some importance to them as explaining and correcting a plan referred to in the lease of 1819 from Baldwin to Cushman. The mortgage Thomas to Bishop and the assignment of lease Boulton to Barnard are not produced. What we have in each case is a memorial for registration signed by the grantee, to the admissibility of which in evidence Mr. Armour objected. I pass over this question as to admissibility because, as I shall explain, neither document, in my opinion, really helps the defendants.

The lease of 1819, Baldwin to Cushman, is a lease for four years of "that certain parcel or tract of land . . . composed of lots numbers six seven and eight in King street . . . and lots numbers six seven and eight in Newgate street . . . containing altogether by admeasurement six acres be the same more or less . . . (except . . . two certain messuages or tenements now erected and standing on lot number six aforesaid in King street . . .)." The rent reserved is 5 shillings per annum, and the lessee covenants that, before the expiration of the term, he will "well and sufficiently enclose and fence the said six acres . . . upon the pickets now standing on the boundary-lines thereof with good and sufficient board-fencing." There is a recital that the lessor "has divided the said six acres . . . into thirty-six building lots to be let or sold as occasion may offer . . . each of which said building lots is to present a front of thirty-six feet on each of the said streets respectively and to be each 188 feet in depth . . . and marked from east to west (upon a certain diagram thereof now exhibited to

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Rose, J.

App. Div.
1917
BALDWIN
v.
O'BRIEN.
Rose, J.

the said parties . . .) with letters A B C D E F G H I J K L M N O P Q R S in each of the said streets;" and the lease goes on to provide that if the lessor, his heirs, etc., shall desire to let, set, and lease any of the said building lots to any tenant or tenants for the purpose of building thereon, he, his heirs, etc., may grant leases for any term of not less than twenty-one years, thereby determining and making void the term of four years as respects any lot or lots so leased; that on any entry for the purpose of leasing etc. as little damage as possible shall be done to the "crops, grass, or tillage" of Cushman; that at the end of the term of four years Cushman shall deliver up possession of the land remaining under his lease "well and in a husbandlike manner set out in good grass;" and, finally, that every tenant to whom a building lot is let shall fence it off.

What right William Warren Baldwin had to make this lease does not appear, nor does it appear whether Miss Willcocks recognised Cushman or allowed him to enter, or whether any building leases were subsequently granted of lands described according to the diagram referred to. Probably, however, it is fair to assume, as Mr. Justice Middleton does, that Miss Willcocks approved of the lease to Cushman, and also that she had knowledge of the diagram, and that the diagram shewed the street formerly known as Boulton street, now Pearl street, running easterly from York street across the six-acre block. The lots are described as running back 188 feet from King street or Adelaide street, and the space between King and Adelaide streets is more than twice 188 feet, so that in all probability the place did shew a street or road where Pearl street now is. Beyond this I am unable to go with the learned trial Judge in the inference that he draws as to what was shewn on the plan. The plan was carelessly drawn or it is inaccurately recited. I have set out the recital at some length, and it will be observed that, while the plan is said to shew 18 lettered lots, 19 letters are given. I cannot find in the recital, or in either of the documents which the trial Judge reads with the recital for the purpose of correcting it in certain particulars, anything to make it clear whether the plan really shewed 18 or 19 lots; and I think that, if Mr. Justice Middleton's attention had been directed to the fact that this uncertainty existed, he would have held, as I feel compelled to hold, that it is

impossible to draw the inference that the plan did or did not shew a lane or lanes running from south to north.

I have said that the trial Judge uses the Thomas to Bishop mortgage and the Boulton to Barnard assignment to correct, in some particulars, the recital in the Cushman lease. In the first-mentioned document, which is a mortgage of part of lot No. 7, there is a reference to a plan "of the said lot" in the possession of William Warren Baldwin, and it appears from the recital that on that plan lot G was west of lot H. In the Boulton to Barnard assignment of a lease of part of lot 8 there is a reference to the diagram or plan "thereof" drawn by William Warren Baldwin, and again it appears that the lettering was from west to east. Mr. Justice Middleton seems to infer from these two documents that the lettering on the plan referred to in the Cushman lease must also have been from west to east. I am unable to draw the same inference. The plans last referred to are, apparently, the one a plan of lot 7 and the other a plan of lot 8, and I cannot find anything to indicate that when they were drawn the general plan of the 6 lots was still in existence or that any piece of land, given a letter on one of the later plans, corresponds with a piece given the same letter on the earlier general plan. However, this inquiry, as to whether the lettering ran from the east or from the west on the early plan, is of importance only if we reach the conclusion that a lane running north and south was shewn on that plan, and we proceed to arrive at the location of the lane. As I have said, I am unable to find that any such lane was shewn. I do not say that no such lane was shewn; but merely that the evidence is insufficient to establish the defendants' contention in that regard.

There is one other matter in connection with the mortgage of 1839 from Thomas to Bishop. The memorial recites a transfer by Thomas to Bishop of part of lot 7 marked "G" on a diagram, which part is bounded on the west by a "reservation for a lane," and the habendum is for the remainder of a term of twenty-one years granted by Miss Willcocks to Watson and Porter, carpenters, in 1831. As I have already said, I think any assumption that lot "G" on the plan of lot 7 referred to in this document is the same thing as lot G on the diagram referred to in the Cushman lease of 1819, is unwarranted, and there is nothing to shew that

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Rose, J.

App. Div.
1917

BALDWIN

v.

O'BRIEN.

Rose, J.

the "reservation for a lane" referred to in this document of 1839 is really the lane in question in this action, even if the recital in this memorial that Miss Willcocks made the lease in 1831 is evidence against the plaintiffs. Moreover, the memorial does not say that the description by which the lands are assigned is the same as the description in the lease from Miss Willcocks, or that the plan of lot 7 "now in the possession of William Warren Baldwin" existed in the lifetime of Miss Willcocks. I am, therefore, unable to say from this document that Miss Willcocks laid out the lane.

I do not think that Miss Willcocks's will helps us to ascertain how the land was used in her lifetime. I shall, however, discuss it later on, in connection with the claim that a right of way was devised.

Even if the documents did shew that there was a lane at the place in question in the lifetime of Miss Willcocks, it would need a great deal more than can be inferred from any of them to shew that she intended to dedicate that lane as a public highway; and, as I have said, one must always keep in mind the fact that proof of an intention to dedicate is essential.

Failure to prove dedication by Miss Willcocks is by no means fatal to the defendants' contention that the lane is a highway. There may have been dedication by a later owner, and it is necessary to examine the evidence as to what has happened since her death.

Upon Miss Willcocks's death in 1834, lot 7 went to William Warren Baldwin and his wife and the survivor of them for life, and after the death of the survivors to William Augustus Baldwin in fee. William Warren Baldwin died in 1844, and in 1845 his wife, who survived him, conveyed to William Augustus Baldwin. In 1852, he made the marriage settlement before mentioned. I do not find any documentary evidence of dealings with lot 7 between 1844 and 1852, but there is evidence that there was a lane about 1842. A witness, speaking of a time about 1849, mentioned a plumber's or brass founder's shop to the east of the lane, the premises running from King street to Pearl street, and an inn to the west of the lane with an entrance from the lane to the stable-yard; but there is nothing that seems to me to indicate that any owner had dedicated the land for a highway.

Passing over for a moment the evidence of user, beginning, as I have said, in 1842, I proceed to examine the documents executed by William Augustus Baldwin. There are but few of these, although he lived until 1883. The first of them is a plan of lot 8 on the north side of King street and lot 8 on the south side of Adelaide street, "D. 32," registered in 1866, upon which the defendants place great reliance. This plan shews the lots coloured pink, and the streets, King street, York street, Adelaide street, and Boulton street, and a lane 12 feet wide, forming the eastern boundary of the lots, all coloured buff. On the west side of York street, lot 9 on the north side of King street and lot 9 on the south side of Adelaide street are shewn uncoloured. There is no numbering or colouring of lot 7 except the lane, and Boulton street is not indicated as extending past the lane or across lot 7; indeed the line marking the east limit of the lane is not broken at Boulton street, and the indication on the plan is that Boulton street ends at the lane. It has been stated already that Miss Willcocks devised lot 7 to trustees for the life of Phœbe Maria Baldwin, and that, after the death of Miss Baldwin, her heirs made conveyances dividing the lot amongst them. Two of these conveyances are produced; they are dated the 18th October, 1866, and are executed by the three heirs of Phœbe Maria Baldwin and by William Augustus Baldwin, the survivor of the trustees, the husband of one of the heirs joining in the one in which his wife is a conveying party, and the wives of the other heirs joining in the one in which their husbands are conveying parties. The conveyances refer to the plan, D. 32, dated the 13th October, 1866, and registered on the day of the date of the conveyances, and convey the lots according to the plan. The plan is signed by the three heirs and William Augustus Baldwin and the Honourable John Ross, the husband of one of the heirs, but the respective capacities in which these persons sign are not stated. It seems obvious that this plan was made for the purpose of the division. Much is made of the fact that William Augustus Baldwin, who was life-tenant of lot 7, signed it. Of course he had not, at the time, power to dedicate the strip as a highway; but an unequivocal declaration by him that it was a highway, being a declaration against his own interest, would be of consider-

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Rose, J.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Rose, J.

able value as evidence. The learned trial Judge thinks that the fact that the colouring is the same for the lane and Boulton street as for King street, Adelaide street, and York street, goes to shew that the lane and Boulton street were, at the time, recognised as public highways. I am unable to agree with him as to this. I think that to draw the inference that he does is to attach altogether too much importance to the fact that the draftsman happened to use one colour rather than another: see *Peters v. Sinclair*, 48 S.C.R. 57, 13 D.L.R. 468, *per* Anglin, J.

Moreover, a statement by William Augustus Baldwin in 1866 that the lane was a highway would be utterly at variance with what he did in 1869, as I shall shew. Indeed, I think that a more reasonable inference from his actions in 1868 and 1869, now to be referred to, taken with the signing of the plan, would be that, until 1869, he was under the impression that the lane was on lot 8.

Walsh and Loveys had for some years a lumber-yard on lot 7, immediately to the east of the lane. Their possession was under leases from William Augustus Baldwin and the trustees of his settlement. The first lease is a lease to Walsh, dated the 8th December, 1868, of a parcel of land running from King street to Boulton street, having a frontage of 175 feet at King street, the point of commencement in the description being "the south-west angle of the land owned by the said William Augustus Baldwin." Some question seems to have arisen as to where this south-west angle was, and in 1869 Mr. Unwin, a surveyor, called at the trial, was instructed by the solicitor for the Baldwin estate to find the south-west angle of lot 7, with a view to a lease that was to be granted to Loveys, as the witness thinks. A lease was granted by William Augustus Baldwin and the trustees of his settlement to Loveys, dated the 27th September, 1869, of a piece of land, part of lot 7, 13 feet in width, running from King street to Boulton street, the point of commencement in the description being "the south-west angle of said lot number 7." The lease is for twenty-one years, and contains provisions that any buildings erected by the lessee shall be built fronting and abutting King street or Boulton street and shall be of brick or stone and not less than three storeys in height on the front; that the lessors may at the end of the term take over any buildings at a price to be fixed by

arbitration; that if the lessors do not take over the buildings the lessees may have a renewal. If William Augustus Baldwin knew that he, while owner, or any previous owner of lot 7, had dedicated the western part of it to the public for a highway, this is a most extraordinary lease. As I have said, he may have thought, until he got Mr. Unwin's report, that the lane was on lot 8; but, whether or not that is so, I do not see how, in face of his action in 1869, we can possibly attach any importance to his supposed declaration in 1866.

I think the only other document that need be referred to is the written reasons for judgment of Mr. Justice Gwynne in the case of *Hughes v. United Empire Club*, tried before him in 1877. This was an action in which tenants of the property immediately to the west of the lane at the south end sued tenants of the property to the east for interruption of a right of way, claiming the lane (1) as a private way and (2) as a public way. The owners of the fee were not parties. Mr. Justice Gwynne found that the lane was "a public lane, specially dedicated by the owners of lots No. 7, as well for the convenience, use, and enjoyment of the lessees of said lots Nos. 8 as of the owners and lessees of said lots Nos. 7," and he granted an injunction. Of course this decision is not binding upon the owners of the fee, but Mr. Justice Middleton, while deciding independently of it, thinks that it can be looked at, having at least the effect of a deed of that date. Assuming that it can be so regarded (*Reed v. Jackson*, 1 East 355, and *Neill v. Duke of Devonshire*, 8 App. Cas. 135), it is only one piece of evidence, and I do not think it is very strong evidence. In one particular it is opposed to the facts as developed before us: Mr. Justice Gwynne says that plan D. 32 shewed the lane situate upon lot 7, and that it "was signed also by the then owners of lots Nos. 7 in order that (it) should be registered." Now the copy of plan D. 32 produced to us does not shew the lane *on* lot 7; as far as the plan goes, the lane may or may not be on lot 8. Also it is not signed by the owners of lot 7, but, as before stated, only by the life-tenant of lot 7, who was a necessary party by reason of his title as trustee of lot 8. There being this apparent inaccuracy in the learned Judge's premises, I am not prepared to substitute his conclusions for the conclusions which I reach upon the evidence.

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Rose, J.

App. Div.
1917

BALDWIN

v.

O'BRIEN.

Rose, J.

I do not think it is suggested that there is any documentary evidence at a date later than 1877, and I turn now to examine the evidence as to user.

It is clear that the lane has existed upon the ground for a long time. As has been stated, one witness takes us back to 1842, and the lane was doubtless there before that time. Persons in the neighbourhood did walk and drive through it without objection; the tenants of the tavern on lot 8, and their visitors, did drive through it into the stable at the rear of the tavern. A witness whose recollection goes back to about 1864 speaks of the tavern as extending back from King street some 25 feet, and north of that an open field with a frog-pond in the centre, and "some old shanties scattered in and out." North of the field, there seems to have been a fence at the west side of the lane. To the east of the lane there was at one time a skating rink, and that seems to have been fenced off from the lane. Afterwards there was the Walsh & Loveys lumber-yard, and it was apparently open to the lane, and Walsh & Loveys loaded their waggons there.

Speaking generally, I think the evidence is that, until the United Empire Club took over the Walsh & Loveys leases, in 1875, any one who felt inclined to go through the lane did so, without objection from the owners or tenants of lot 7. In 1875, the United Empire Club erected gates, and the action tried before Mr. Justice Gwynne was the result. The formal judgment in that case was not taken out until 1886. The endorsement on the record was for \$5 damages and an injunction against interfering with the plaintiffs' access to their property. The judgment as issued goes further and prohibits any interference with the passage of the public. Mr. Justice Middleton thinks that the reason the judgment was not issued earlier was, that the United Empire Club took down the gates and ceased to obstruct Hughes. Perhaps the assumption that the gates were taken down is rather opposed to the evidence of Mr. Small, and it is certainly opposed to the evidence of Walsh, who says that in 1884 there were gates at the south end and a fence across the north end; and the evidence of Brown, who made a survey in 1886, and found a fence across the north end; and the evidence of Mr. J. Ross Robertson, who saw the gates there (open it is true) about 1883. Whatever may

have been done as between the United Empire Club and Hughes, it seems to me to be unsafe to assume that after 1875, when the Club took possession, the user by the public was such user as would be anything like convincing evidence of dedication. The Canadian Pacific Railway Company, and its subsidiary company, the Dominion Express Company, acquired possession of the United Empire Club building in 1884 or 1886, and remained in possession until 1896 or 1897, when the present tenants, the North American Life Assurance Company, came in. These tenants, by shutting the gates and otherwise, made such frequent assertion of their title that the user by the public during their time is of no value.

In considering the evidence of user by the public, it is important to remember that in the earliest period spoken of there was much vacant land in the neighbourhood, over which persons passed without objection; that, as the place became built up, or perhaps at the earliest time at which we have evidence of the use of this lane, there were two other lanes to the east of it running north and south through the property once owned by Miss Willcocks; that at one time there was a lane running east from York street, half-way between King street and Pearl street, and at a distance of about 100 feet from York street, winding north to Pearl street; that all of these lanes were used by the public just as freely as the lane in question, but that they have disappeared; that, at least since the Walsh & Loveys leases in 1868 and 1869, the part of lot 7 upon which the lane is situate has been held under long leases by lessees, who would need the lane for their own purposes, and would not be much inconvenienced by the public passing through it. Of course the fact that the land has been in the possession of a succession of tenants does not prevent the drawing of the inference of dedication. See cases collected in *O'Neil v. Harper*, 28 O.L.R. 635. But it is something to be considered like all the other circumstances. The points to be noted are, first, that "the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee:" *Folkestone Corporation v. Brockman*, [1914] A.C. 338, *per* Lord Kinnear, at p. 352.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Rose, J.

App. Div.

1917

BALDWIN

v.

O'BRIEN.

Rose, J.

In the case just cited Lord Kinnear goes on to refer to the statement of the law by Lord Halsbury, L.C., in *Macpherson v. Scottish Rights of Way and Recreation Society* (1888), 13 App. Cas. 744, and quotes the following statement by the Lord Chancellor (p. 747) as to a question that had been asked in the Court below: "A question is put by Lord Young to which, if I were not able to give an answer, I should feel that the respondents ought to be able to furnish it to me. Lord Young, quoting the Lord Ordinary, says 'The question is whether such use as has been proved is to be ascribed to tolerance or right. Why, I venture to ask,' says Lord Young, 'is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or interfered with it by appealing to a Court of law to prevent such use of it, upon any of the occasions which have been referred to? Why, he would have been thought very ill of by his neighbours, and I think deservedly.' Now I say that if no answer could be given to that question I should take a different view from that which I have been at last compelled to take." Then Lord Kinnear proceeds ([1914] A.C. at p. 354): "I think Lord Young's question is exactly that which would have required an answer in the present case, if we had been concerned with matter of fact."

My judgment is already too long, and I therefore refrain from a more minute examination of the evidence as to user, confining myself to the statement that, after reading all of it, and some of it more than once, considering all of it, including the evidence as to the use made by Miss Johnston's employees, as well as by those who had no business in properties immediately adjoining the land, and applying the knowledge that we all have as to the use that is made in this country of lanes like the one in question (see *Hunter v. Richards*, 28 O.L.R. 267, at p. 270, 12 D.L.R. 503), it seems to me that the defendants have failed to shew that the use that has been proved is to be ascribed to a "right" rather than to "tolerance." I do not think it is necessary or desirable to quote further from the cases, but I may call attention to the fact that the evidence here falls very far short of what was held in some of the cases cited to be sufficient evidence of dedication and acceptance, e.g., *O'Neil v. Harper*, 28 O.L.R. 635. Here there is absolutely no pretence of any acceptance by the municipal corporation.

Turning now to the alternative claims put forward by the defendants, and first the claim of a right of way by prescription: if the use that the defendants made of the lane is attributable to their belief that it was a public highway, they did not by such use acquire an easement: *Adams v. Fairweather*, 13 O.L.R. 490; see also *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool) Limited*, [1915] A.C. 599, 617; *Attorney-General v. Horner*, [1913] 2 Ch. 140; Gale on Easements, 9th ed., p. 230, where it is pointed out that the case cited by Mr. Tilley, *Earl De La Warr v. Miles*, 17 Ch. D. 535, 591, is a case relating to a *profit à prendre*.

That the claims put forward on behalf of William Willcocks Baldwin in 1888 and 1889, and on behalf of Hughes in 1890, were based upon the belief in the existence of a public right, is clear from the letters from their respective solicitors; and that the later claims were based upon the same belief appears from the evidence of Mr. Charles Millar; so that I think the claim fails upon this ground, and that it is unnecessary to consider whether the way used was sufficiently definite, or whether the user was sufficiently open or continuous.

Next, as to a lost grant: I think this claim fails for the same reason as the claim to a title by prescription. It is true that we are not here concerned only with the most recent period as in the claim to a prescriptive right: *Watson v. Jackson*, 31 O.L.R. 481, 490, and authorities cited; it is also true that in the pleadings in *Hughes v. United Empire Club* there was the claim of an easement as well as the assertion of a right as one of the public; but to my mind the evidence, as a whole, indicates that whatever right has been asserted to this way is a right as one of the public. Adopting the language of Cozens-Hardy, M.R., in *Attorney-General v. Horner*, [1913] 2 Ch. 140, at p. 169: "I am not prepared to make a presumption not in accordance with rights claimed. Long user not explained may justify the Court, and, indeed, in some circumstances, may almost compel the Court, to presume what is necessary to give validity to the usage. When, however, the right claimed cannot be established on the ground claimed, an incidental portion of the right claimed cannot be established on the mere ground of long usage. In other words, a presumption to support a right claimed may be reasonable, but

App. Div.
1917

BALDWIN
v.
O'BRIEN.

Rose, J.

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Rose, J.

a presumption to support a mere fragment of a right claimed and never exercised apart from the right claimed is a wholly different proposition."

Besides all this, it does not seem to me that the way used in the early part of the period under consideration is really identified with the way now claimed. The locations of whatever side-door there may have been to the tavern and of whatever entrance there may have been to the stable are not definitely fixed, and we do not know that the location of the present door corresponds with either. Indeed, the evidence of Brown, who made surveys in 1886 and 1889, makes it at least doubtful whether there was at that period any door in the side of the building west of the lane.

Finally, there is the claim that Miss Willcocks's will, devising lot 8 to one and lot 7 to another, gave to the devisee of lot 8, as appurtenant to that lot, the right of way over lot 7 that had been used by the occupant of lot 8 in Miss Willcocks's lifetime. I do not think that the facts of this case bring it within the authorities upon which the defendants rely. In the first place, there is really no evidence as to how the respective lots were used in Miss Willcocks's lifetime. True, it is said that some such evidence was given by a witness in the *United Empire Club* case; but, whatever effect is to be given to the judgment in that case, I do not think we have any right to consider the statements of the witnesses. Secondly, the words of the devise of the fee of lot 8 contain no reference to appurtenances, although appurtenances are mentioned in the gift of the life-estates; so that, if the right of way was devised, it was devised by implication solely, and not expressly as an appurtenance. Thirdly, the will did not separate the properties at once upon the death of the testatrix, but only after certain life-estates. *International Tea Stores Co. v. Hobbs*, [1913] 2 Ch. 165, cited by Mr. Tilley, is a case of a deed, and depends upon the Conveyancing Act of 1881, corresponding somewhat with the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 20; and *Phillips v. Low*, [1892] 1 Ch. 47, was the case of a continuous easement, light, and the house devised to the persons through whom the plaintiffs claimed, "contained widows so constructed as to involve a necessary dependence, in order to its enjoyment of light, upon the adjoining tenement" (pp. 52, 53).

It seems to me that, even if we assume that in the lifetime of Miss Willcocks there was a building on lot 8, and that the occupants of it used the lane, this case is much more like *Polden v. Bastard* (1865), L.R. 1 Q.B. 156, than like *Phillips v. Low*. See also *Pearson v. Spencer* (1861), 1 B. & S. 571.

I would allow the appeal.

Appeal allowed with costs.

App. Div.
1917
BALDWIN
v.
O'BRIEN.
Rose, J.

After the above judgment had been pronounced, the defendants the North American Life Assurance Company moved for an addition to the judgment, viz., that their costs of the action and appeal should be paid by their co-defendants, either directly or through the plaintiffs; and the plaintiffs asked leave to amend their statement of claim so as to allege injury to the reversion, and also asked that the judgment of the Court should include an injunction against any invasion of their rights by the defendants against whom they had succeeded.

June 18 and 19. The motions were heard by the Court as before constituted.

Paterson, K.C., for the defendants the North American Life Assurance Company.

Armour, K.C., and *Carrick*, for the plaintiffs.

R. H. Parmenter, for the defendants O'Brien, McLean, and Verral.

June 22. The judgment of the Court was read by MEREDITH, C.J.C.P.:—Mr. Paterson, for the defendants the insurance company, now asks that these defendants be awarded costs of the action and of this appeal to be paid by their co-defendants, either directly or through the plaintiffs.

These defendants in their pleadings supported the plaintiffs' claim against their co-defendants; and set up themselves a claim against their co-defendants; but I know of no right to make such a claim, and nothing came of it: the only issue tried was that between the plaintiffs and their co-defendants: so we were not concerned with any other question, and dealt with none other.

Mr. Paterson and Mr. Armour both contend that the insurance company were proper parties to the action; but I am unable yet

App. Div.
1917

BALDWIN
v.

O'BRIEN.

Meredith,
C.J.C.P.

to perceive why. The plaintiffs sued, and could sue, only in respect of their reversionary rights and in respect of an infringement of such rights by the defendants other than the insurance company; why then should their tenants be parties to the action; there is no suggestion that they were parties to any such infringements upon the plaintiffs' rights? These tenants might be co-plaintiffs with them if any like infringements of their rights were complained of: but it is said such rights were dealt with and are concluded in the case tried by Gwynne, J.; and so could not be raised here again: but, however that may be, no question between the insurance company and their co-defendants was raised or dealt with in this action: consequently these defendants were unnecessary parties, and if they had disclaimed might have had costs to that extent from the plaintiffs: but they did not, and do not now, and so ought not to have costs from the plaintiffs: and it would be out of the question to say that their co-defendants should be saddled with any additional costs by reason of these defendants being made parties to the action. The action should be dismissed, and there should be no order as to costs, as to them.

Mr. Armour asks leave to amend his statement of claim so as to allege injury to the reversion: no one objects: no reasonable objection could be made: the amendment may be made.

He also asks that the judgment of the Court include an injunction against any invasion of their rights by the defendants against whom the plaintiffs have succeeded. That they may have: it may more clearly define the rights of the parties.

No costs of these motions.

[APPELLATE DIVISION.]

1917

March 24.
June 8.

RE FAULKNERS LIMITED.

ARTHUR & Co. (EXPORT) LIMITED'S CLAIM.

Company—Winding-up of Retail Trading-company—Wholesale Creditor's Claim for Price of Goods Sold on Credit—Preference or Priority over Ordinary Creditors—Fraud—Failure to Prove—Affirmance of Contract—Property in Goods and Possession, when Passing—Intention of Parties—Sale from Samples, not by Sample—Goods Shipped from Abroad—Freight Paid by Purchaser—Right of Inspection—Acceptance.

In October, 1914, an incorporated company, retail merchants in Ottawa, Ontario, gave to the travelling salesman of a wholesale company, doing business in Scotland, an order for goods of various kinds, indicated by "samples" selected from these displayed by the salesman. The order was sent on to the Scottish company, who packed the goods and shipped them from Glasgow, on the 20th January, 1915, and sent the shipping bills and other papers to the buyers by post. The sale was on credit. The goods arrived in Ottawa on the 19th February, 1915. The buyers had them taken from the carriers and placed in a bonded warehouse, where they remained until the customs duty was paid; they were taken out in various parcels, and placed in stock by the buyers, on dates ranging from the 4th to the 25th March, 1915. The freight was paid by the buyers to the carriers. On the 3rd March, 1915, a proposal was made by a person acting on behalf of certain creditors of the buyers to the creditors generally that the time for payment of the buyers' debts should be extended. The creditors refused the proposal. A winding-up order was made on the 20th March, 1915. In July, 1915, an affidavit was made by the sellers' registered attorney in Canada, proving the sellers' claim against the insolvent estate, and in that affidavit it was said that the insolvent company were justly and truly indebted to the sellers in a sum named "for goods supplied to the said debtors at Ottawa," giving particulars, and that the sellers held no security:—

Held, that there was no ground for a charge of fraud: the sale was not made in reliance upon any false statement as to the solvency of the buyers, and there was no evidence that they bought with the intention of not paying for the goods; and, if the contract had been brought about by the fraud of the buyers, there was no rescission by the sellers; but, on the contrary, an affirmance, nearly five months afterwards, in the claim made and proved by their registered attorney.

Held, also, that the facts of the case did not bring it within the rule that where the sale is on credit the seller is excused from delivery if the buyer has become insolvent: no such circumstances had been proved as would absolve the sellers from their obligations under the contract, if they had been unfulfilled on the 2nd March, 1915.

But those obligations had then been fulfilled: the property in and the possession of the goods had passed to the buyers before the 2nd March, 1915.

The property passes when the parties to the contract intended it to pass—their agreement governs. The sale was not a sale by sample, but a sale from samples; it was not a case where the intention of the parties must have been that the property should not pass until the buyers had inspected the goods and found them to be equal to sample; the property passed on or before the 20th January, 1915, when the goods were delivered to the carriers for and in the name of the buyers: and the possession passed then too, by the sending to them of the bills of lading made out in their favour. In addition to this, when the goods reached Ottawa in February, the buyers, having paid the carriers their charges, took the goods from them and left them as their (the buyers') own goods at a bonded warehouse.

1917
RE
FAULKNERS
LIMITED.
ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

Order of CLUTE, J., affirming the finding of the Referee in the winding-up proceedings, that the sellers must rank with the ordinary creditors upon the estate, and were not entitled to preference or priority, affirmed.

APPEAL by Arthur & Co. (Export) Limited, creditors, from the finding and certificate of an Official Referee, upon a reference for the winding-up of Faulkners Limited, an incorporated company, that the appellants were not entitled to rank as preferred creditors upon the assets of the insolvent company in the hands of the liquidator, but were entitled to rank as ordinary creditors only.

March 19. The appeal was heard by CLUTE, J., in the Weekly Court at Toronto.

A. C. Heighington, for the appellants.

G. D. Kelley, for the liquidator, respondent.

March 24. CLUTE, J.:—Appeal from the certificate of the Official Referee at Ottawa, holding that the claim of Arthur & Co. (Export) Limited must rank with those of other creditors. The appellants in this case contend that they are entitled to priority for their claim upon two grounds: (1) that the property did not pass before the insolvency; (2) that the company, Faulkners Limited, received the goods after asking for a compromise at 60 cents on the dollar, which amounted to a fraud upon the appellants.

The facts are not disputed. In October, 1914, the appellants sold to Faulkners Limited, by sample, certain merchandise. The purchasers were to pay freight from Glasgow. The goods were shipped, and arrived at the freight-station in Ottawa on the 19th February, 1915. The company not having money to pay the freight, the goods were transferred to the customs warehouse. On the 4th March, the company paid the freight on a certain portion of the goods, and transferred the goods to the company's premises, unpacked them and put them on the shelves. On the 6th March, further freight was paid, and on the 8th, all of the freight was paid, and the goods transferred to the company's premises in Ottawa, except a small portion. It was on the 2nd March that the company, through their agent, offered a compromise at 60 cents on the dollar to their creditors. This was refused, and an assignment was made on the 12th March, 1915.

It was argued on the part of the appellants that, on account of the offer made of compromise on the 2nd March, and there being no doubt from the evidence that the company were insolvent on that date, there was such an act of bankruptcy that the receipt of the goods afterwards amounted to a fraud upon the claimants, and upon this ground they should have a preference. It was further contended that the property did not pass, as the company were entitled to a reasonable time to inspect, and that the assignment had been made before such time had elapsed.

I think it quite clear that the creditors cannot succeed upon either of these grounds. The purchasers paying the freight, the delivery was at Glasgow, and upon such delivery the property passed, and there was nothing that occurred subsequent to that which caused the property to re-vest. Even could it be held that the property did not pass until delivery at Ottawa, it is quite clear that, before assignment, the company took possession of the goods and accepted them without objection. There was no stoppage *in transitu* nor any action taken by the appellants in any way to retain their claim. The suggestion that the act of insolvency, by offering a compromise of 60 cents on the dollar, when the company was insolvent, could prevent the property passing, if it had not already passed, is wholly unsupported by authority.

The motion must be dismissed with costs.

The claimants appealed from the order and decision of CLUTE, J.

May 22. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

A. C. *Heighington*, for the appellants, argued that the contract made between the company and the appellants had been procured by fraud. Therefore no property in the goods passed to the company. But, whether there was fraud or not, the property in the goods did not pass—the company had wrongfully converted the goods to their own use. The liquidator was also guilty of conversion, as he could not stand in any better position than the company. The property did not pass, because the goods were sold according to sample, and were not inspected and accepted by

Clute, J
1917
RE
FAULKNERS
LIMITED.
ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

App. Div.
1917

RE
FAULKNERS
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

the purchasers: Benjamin on Sale, 5th ed., p. 642, and p. 809. The purchasers could not accept after insolvency: *Ex p. Stapleton* (1879), 10 Ch.D. 586; *Morgan v. Bain* (1874), L.R. 10 C.P. 15; *In re Phœnix Bessemer Steel Co.* (1876), 4 Ch.D. 108; *Pardee v. Kanady* (1885), 100 N.Y. 121; *New England Iron Co. v. Gilbert (Metropolitan) Elevated R.R. Co.* (1883), 91 N.Y. 153, at pp. 168, 169.

G. D. Kelley, for the liquidator, respondent, contended that there was no evidence of fraud; that the sale was not a sale by sample; that Glasgow was the place of delivery; and that the goods had gone into the possession of the company as soon as they were handed to the carriers, addressed to the company.

Heighington, in reply.

June 8. MEREDITH, C.J.C.P.:—The appellants are wholesale dry goods merchants, carrying on business at Glasgow, in Scotland; and Faulkners Limited were retail dry goods merchants, carrying on business at Ottawa, in Canada.

In the month of October, 1914, Faulkners Limited gave to the appellants, through one of their travelling salesmen then in Ottawa, orders for goods the prices of which amounted to about £366. This purchase of goods was one of an ordinary character, made in the usual way. The salesman displayed his wares in the shape of samples, as they are commonly called; the retail merchants' buyer was thus enabled to see generally what the wholesale sellers offered for sale and could supply, and ascertain the prices: and, acting accordingly, in quite the usual manner of buying and selling between retail and wholesale dealers in such wares, the buyer "ordered," and the seller agreed to supply, a large quantity of many kinds of such wares; and thereupon the salesman sent the "order," by post, to his employers, at their place of business in Glasgow, in the usual manner of carrying out such transactions.

In due course, and in quite the usual manner, the "order" reached the appellants, the goods ordered were packed and sent to the buyers, and the shipping bills and other papers were sent to them by post. The shipment was made on the 20th January, 1915, at Glasgow; and the goods arrived at Ottawa on the 19th February, 1915.

The buyers, instead of taking the goods into stock at once, followed the very common custom of having them taken from the carriers and placed in a bonded warehouse until the duty could be paid and until otherwise it should be convenient to take the goods into stock. The duty upon such goods is large, running from one-fourth to one-third or more of their cost; and, the buyers not having the means of paying so large an amount conveniently at the time, the quite common course I have mentioned was adopted.

The duty was paid upon nearly all the goods, and they were taken into stock in the month of March, on the 4th, 6th, 9th, 11th, and 25th days of that month.

The freight upon all of them was paid to the carriers by the buyers before the goods were delivered by them and removed to the bonded warehouse, on the 3rd March.

The buyers' business is now in liquidation under the provisions of the Winding-up Act, the winding-up order having been made on the 20th March, 1915.

In July, 1915, an affidavit, proving the appellants' claim against the insolvent estate, was made by a member of the Bar of this Province, in which he is so described, in addition to the description of "the registered attorney in Canada" of the wholesale merchants, the sellers of the goods in question: and in that affidavit it is said that Faulkners Limited are justly and truly indebted to the sellers in the sum of \$2,739.25 "for goods supplied to the said debtors at Ottawa as follows:"—

1915: March	4—To bill due.....	£ 64.13	
April	4—To bill due.....	64.8	
May	4—To bill due.....	64.10.6	
			£193.11.6
Jan.	20—Goods Tow Head SS...	£269.2.10	
Jan.	20—Goods Tow Head SS...	48.9.6	
Jan.	20—Goods Tow Head SS...	48.4.11	
	Charges.....	3.9.7	
			£369.6.10
			£562.18.4

And "3, that Arthur & Co. (Export) Limited hold no security whatever for the said claim or any part thereof."

From one of the letters filed, it appears that the solicitor had

App. Div.
1917
—
RE
FAULKNERS
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.
—
Meredith,
C.J.C.P.

App. Div.
1917
—
Re
FAULKNERS
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.
—
Meredith,
C.J.C.P.

had his clients' claim placed in his hands in the month of March, 1915, and that in that month he had begun his inquiry into the facts of the case: proof of the claim, in the manner I have mentioned, was not made until four months afterwards.

And now the appellants have completely changed their position, and claim, in regard to the goods shipped by them to Faulkners Limited, in January, 1915; their present contentions, through the same solicitor, being:—

(1) That the contract, made in October, 1915, to sell such goods was procured by the fraud of the purchasers, and that therefore no property in, or right to, the goods ever passed to them: and

(2) That, in any case, no property in the goods ever passed, under the transaction in question, to the purchasers: but that they wrongfully converted them to their own use: and that the liquidator of their estate can stand in no better position than they, and so he was guilty of a wrongful conversion of the appellants' goods in selling them, as he did, as part of the insolvents' estate.

The appellants' claim, thus made, has been heard by the local referee, in the winding-up proceedings, at Ottawa, and by Clute, J., upon an appeal against the judgment of the local referee upon it; and each of them was clearly of opinion that the appellants' real rights in the matter are those deposed to in the affidavit of their solicitor of July, 1915, to which I have referred; and that there is no substantial ground for the changed claim which they now make. This appeal is against that judgment of Clute, J.

Upon the first point made in it, I am unable to find any fact proved upon which any charge of fraud could even plausibly be made. There was no assertion made, nor any assurance asked for, at the time of the sale in October or at any other time, that the buyers were in solvent circumstances: and, if there had been, there is no evidence that they were not; and so the sale could not have been made in reliance upon any false statement of that character: whilst to assert that the buyers bought with the intention of never paying for the goods would be to assert something of which there is no evidence and which indeed would be quite disproved by the facts and circumstances of the case. Until the unfavourable response came, in the month of March, 1915, to an expressed need for an extension of time for payment of their

debts, I have no doubt Faulkners Limited, and the creditors as well, expected that the business would be carried on and carried on successfully: see *Ex p. Whittaker* (1875), L.R. 10 Ch. 446.

And, if the contract had been brought about by the fraud of the buyers, there was no rescission by the sellers on that, or indeed on any, ground; but, after inquiry and with full knowledge of the facts, there was, almost five months afterwards, an affirmation of it in "the claim" made and proved by their "registered attorney," as I have mentioned.

The other ground of the appeal, like that which I have dealt with, is quite indefinitely stated, but seems to be this: that the property in the goods had not passed to the purchasers when the Martin letter was written, on the 3rd March, 1915, intimating that Faulkners Limited were unable to meet their liabilities as they fell due and proposing an extension of time for payment of their debts: that the property had not passed, because the goods were sold according to sample, and had not been inspected and accepted by the purchasers when that letter was written: that, therefore, the property in the goods always remained in the sellers; that the subsequent taking possession of them by the buyers was a wrongful act which gave no right in them to the buyers; and that the liquidator, therefore, never had any right to them, and, having sold them, is answerable to the appellants for their price or value.

But that is a position which seems to me to be assailable at many points.

When a purchaser of goods, not yet delivered to him, tells the seller that he will not pay for them if delivered, the seller need not deliver the goods; but there cannot be a rescission of the contract without the consent of the seller. There may, of course, be a tacit concurrence in putting an end to the contract; and actions may speak as well as words: see *Morgan v. Bain*, L.R. 10 C.P. 15, and *In re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108. In *Ex p. Stapleton*, 10 Ch.D. 586, it was said by Jessel, M.R., at p. 590, that "if a person who has entered into a contract of this kind gives to the vendor before he has parted with the goods that which amounts in effect to this notice, 'I have parted with all my property, and am unable to pay the price agreed upon,' it is equivalent to a repudiation of the contract. Of course that

App. Div.
1917
—
Re
FAULKNERS
LIMITED.
ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.
—
Meredith,
C.J.C.P.

App. Div,
1917

Re
FAULKNERS
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

Meredith,
C.J.C.P.

would not affect the right of the trustee in the liquidation to elect to fulfil the contract on paying the price in cash, provided that he does so within a reasonable time;" and he subsequently added that a sub-purchaser from the debtor might do so too. And in the case of the *Phoenix Bessemer Steel Co.*, the same Judge said (4 Ch.D. at pp. 113, 114): "It appears to me that, in order to bring the case within the rule, there must be that sort of insolvency declared which ought to satisfy every reasonable man that there is no intention on the part of the purchaser to pay for the goods, and no probability that he will pay for them."

And the rule in the United States of America is said to be, that: "If the contract of sale is executed the subsequent insolvency of the buyer is not ground for rescission:" and that: "Where the sale is on credit the seller is excused from delivery if the buyer has absconded, or has become insolvent. If, however, the buyer is ready to substitute cash for the credit, his insolvency does not excuse the seller:" Cyclopædia of Law and Practice, vol. 35, pp. 135 and 253.

Taking the rule to be as stated in the cases I have mentioned, there is far from being enough to bring this case within it. The Martin letter was not a letter of the buyers: Martin, an accountant, had been employed by creditors of Faulkners Limited to investigate their affairs; and he, in such employment, having come to the conclusion that an extension of time was necessary to enable the company to carry on its business, wrote, in his own name and upon his own letter-paper, the letter of the 3rd March, 1915. That which Martin proposed, the company, no doubt, were satisfied with, and desired: and it must be that it was considered by all concerned a satisfactory solution of the company's difficulties, and a proper one, and so one which was likely to be carried out. Martin, acting for creditors, would not have suggested it if it had not appeared to him to have been in the interests of the creditors, and the company would not have acquiesced in it if it had not seemed to be a feasible means of enabling them to carry on business successfully. The company were not insolvent, as a going concern; they had assets to the amount of over \$25,000 in excess of their liabilities, and were said by Martin to be in a somewhat better position financially than they had been two years before. What they lacked was credit, credit with lenders of money as well

as with sellers of goods; that credit without which few mercantile concerns, if any, could carry on business successfully. There is no evidence that insolvency was announced by the company at any time; on the contrary, until the creditors refused to accept Martin's proposition, nothing was expected but that the company should be able, and should continue, to carry on their business, and do so successfully: and nothing to the contrary was said by the company. It is true that in the month of February, 1915, a creditor commenced proceedings for the winding-up of the company; but that is not an altogether uncommon method adopted to enforce a single creditor's claim, nor one that never succeeds. It seems to have succeeded, in that sense, because nothing ever came of it. If it did not succeed in that sense, it must have failed for want of merit: it is said to have been "dropped."

And so, even if the case were as the appellants state it on this branch of the appeal, it should fail, because no such circumstances have been proved as would have absolved the appellants from their obligations under the contract in question, if they had been unfulfilled on the 2nd March, 1915; and that seems to me to be made abundantly plain by the conduct of the appellants, through their legal adviser, in continuing to act as if the contract were in full force until, at least, the end of July, 1915, and then claiming, under oath, only as simple creditors of Faulkners Limited, without any security whatever, for the full price of the goods in question.

But the case is not as the appellants state it on this branch of the appeal; it is in all material respects very different.

Not only had the property in the goods passed to the buyers before the 2nd March, 1915, but, as I find, the possession also had passed to them.

When property passes, in the case of a sale of goods, is when the parties to the contract intended it to pass; their agreement in that respect is that which binds, and so the question is one of fact.

It is said for the appellants that the sale was a sale of goods by sample, and that, that being so, the intention of the parties must have been that the property should not pass until the buyers had inspected the goods in question and found them to be equal to the sample, and that that had not been done when the Martin letter was written. But that contention seems to me to be based upon a confusion of a sale by sample with a sale from samples. The

App. Div.
1917

RE
FAULKNERS
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

Meredith,
C.J.C.P.

App. Div.
1917

RE
FAULKNER'S
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

Meredith,
C.J.C.P.

sale in question was one from samples, samples sent out by the sellers so that they might put buyers, carrying on business out of Glasgow, as nearly as possible in as good a position to buy at their own place of business as if they were buying in the sellers' warehouse in Glasgow; and it could hardly occur to any one, if buying in the warehouse, in almost the same manner, that he was buying by sample. Samples would there be shewn in the warehouse in the same manner, but in greater quantity, and purchases would be made accordingly, not of the goods exhibited but of goods of that kind, just as the sale in question was made. The goods are in each case described and numbered, and the purchase is made by description and number. In this case, a good many more than an hundred different kinds of goods were purchased: to say that in such a case the sale was by sample, that the contract was that each should be in accordance with the sample, and that there was to be an inspection for the purpose of comparing them with the samples exhibited, is to say that which, by reason of its impracticability only, no business man would seriously assert. In a case of a sale by sample the buyer usually retains the sample to be the guide in the inspection or other test: in cases such as this the samples go with the salesman; they are part of the stock-in-trade of his employers. Sales by sample were familiar transactions years ago, but are very infrequent here now: they were applicable to sales of bulky goods such as wheat, flour, and other like commodities, but in these days sales according to grade have almost entirely superseded sales by sample. So that it may be that some might confuse sales according to sample with sales from samples, notwithstanding their very wide difference. Sales by sample have very much gone out of vogue, whilst sales from samples have very much come in.

And if a sale by sample, why an inspection in Ottawa and not at the Glasgow warehouse? The home of the samples was there: the prices to be paid were the prices of the goods in the warehouse: the freight was to be paid and was paid by the buyers: the goods were to be shipped and were shipped for the buyers and in their name: they were to pay, and were charged with, the cost of boxing and shipping: the goods were to be insured and were insured for and in the name of the buyers: and the bills of lading, giving absolute control over the goods, were to be sent, and were

sent, to the purchasers: so that in all details the sale was the same as if it had been made at the sellers' warehouse in Glasgow, except that it was effected by a travelling salesman, with samples from the warehouse, at Ottawa, instead of in the warehouse at Glasgow.

In these circumstances, I can have no manner of doubt that the property in the goods passed to the buyers when the goods, having been selected and packed in accordance with the intention of the parties, were delivered to the carriers for and in the name of the buyers: and that the possession of the goods then also passed to the buyers, that fact being put beyond all question by the sending to them of the bills of lading made out in their favour. And all this took place on or before the 20th January, 1915: and so the sellers were quite right in making their claim for the price of all the goods in question as goods sold and delivered to the buyers on that day; and their solicitor was also quite right in verifying that claim upon his oath.

And, in addition to all this, when the goods reached Ottawa, in the month of February, the buyers, having paid the carriers their charges, took the goods out of their possession, so that the carriers had no more control over them in any manner, and left them, as their (the buyers') own goods, in a bonded warehouse, until they should, at their convenience, pay the customs duties and remove the goods to their own place of business.

I am therefore clearly of opinion that Clute, J., and the Referee, as well as the appellants' solicitor in proving their claim in July, 1915, were quite right in the view taken by them of the transaction in question; and to this concert may be added the voice of Faulkners Limited and the words of the appellants, conspicuously printed in red ink at the head of their invoices of the goods in question, dated the 20th January, 1915, plainly indicating that their obligations ended with the shipment of the goods, and warning the buyers that, if any of the goods had been abstracted, they should at once make claim against the carriers, "*who alone are responsible.*"

And I may add that the contention made in this case, in the appellants' behalf, does seem to me to be an extraordinary one to be made in any wholesale merchant's behalf: if, in a typical sale such as that in question, the property in the goods does not

App. Div.
1917

RE
FAULKNERS
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

Merodith,
C.J.C.P.

App. Div.
1917

RE
FAULKNERS
LIMITED.

ARTHUR
& Co.
(EXPORT)
LIMITED'S
CLAIM.

Meredith,
C.J.C.P.

pass to the buyer until he has, at his place of business, inspected and accepted, as "up to sample," the goods; if all risks as to loss and injury of the goods are to be the seller's, and they are to remain his, however they may be rejected, his lot would be a rather hard one, and assuredly not one that he should seek in a Court of law to have fastened upon him. It must not be overlooked that when property passes the right to stop *in transitu* is an effectual safeguard.

This appeal should, in my opinion, be dismissed.

RIDDELL, LENNOX, and ROSE, JJ., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1917

June 12.

MORTIMER v. FESSERTON TIMBER CO. LIMITED.

Assignments and Preferences—Assignment for Benefit of Creditors—Agreement of three Principal Creditors with Debtors that all Creditors be Paid pro Ratâ—Consideration—Mortgage Made to one of three—Assignments and Preferences Act, R.S.O. 1914, ch. 134—Action by Assignee to Make Mortgage Available for all Creditors—Addition of Creditor as Plaintiff Suing on Behalf of all—Equalising of Payments as of Date of Agreement—Distribution of Assets—Accounting.

In an action by the assignee for the benefit of creditors of a mercantile firm, under an assignment made in January, 1916, pursuant to the Assignments and Preferences Act, to set aside as fraudulent and void a mortgage made by the firm in February, 1915, to the defendant company, a creditor, or for a declaration that the plaintiff was entitled to hold the mortgage as trustee for and on behalf of the creditors of the firm, it was found by the trial Judge, upon contradictory evidence, that at a meeting of the members of the firm and their three principal creditors, on the 21st July, 1914, an arrangement was made by which these creditors formed themselves into a committee to look after the affairs of the firm upon the basis that all the creditors were to be paid *pro ratâ*; and it was declared that the mortgage was available for and to be applied by the plaintiff in the ratable payment of all creditors of the firm:—

Held, that the finding of fact of the trial Judge could not be disturbed; and (FERGUSON, J.A., dissenting) that, upon a creditor being added as a party plaintiff and an amendment being made so as to claim relief on behalf of all creditors, the assignee-plaintiff should be declared to hold the mortgage in the first place to equalise the claims of creditors as they existed on the 21st July, 1914, excluding from the benefit of the security those who had received more than their proper proportions unless they agreed to refund, and excepting the small creditors who might have been paid in full, taking

into account the payments made, but excluding from consideration goods supplied to the firm after that date and payments specifically applied thereon, and then for the general benefit of all creditors who should file claims with the assignee.

Per HODGINS, J.A.:—The arrangement between the debtors and the three creditors was intended for the benefit of the body of creditors, but each of the three was restricted to *pro rata* payments, in consideration that the others refrained from pressure or suit against the debtors. This consideration was sufficient to uphold the bargain. The defendant company had by the mortgage obtained an advantage which was inconsistent with its position under the agreement.

Semble, that the preference given by the mortgage, while unjust if regarded in the light of the arrangement of July, 1914, was not strictly within the provisions of the Assignments and Preferences Act.

1917
—
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.

AN appeal by the defendant company from the judgment of BOYD, C., at the trial, on the 17th November, 1916, in favour of the plaintiff, the assignee for the benefit of the creditors of Richard Smith & Son, in an action to set aside a mortgage made by the defendant Richard Smith to the defendant company, dated the 1st February, 1915.

The judgment of the Chancellor declared that the plaintiff, as trustee for creditors, was entitled to hold the mortgage made to the defendant company, and that the mortgage was available for the ratable payment of all creditors of the firm of Richard Smith & Son.

January 23. The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, J.J.A.

G. W. Mason, for the appellant company, argued that, when the mortgage in question was made to the company, the firm of Richard Smith & Son was not in insolvent circumstances within the meaning of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5 (2), and the trial Judge had not found as a fact that the firm was insolvent. He referred to Cassels' Ontario Assignments Act, 4th ed., pp. 26-33, and the cases there collected.

Gideon Grant, for the plaintiff, respondent, argued that the evidence shewed that the firm of Richard Smith & Son was in a hopeless condition from a financial point of view when the mortgage was made, and that the judgment of the learned Chancellor was correct.

The following authorities were referred to in the argument: Halsbury's Laws of England, vol. 1, p. 175; *Jones v. Hope* (1880), 3 Times L.R. 247 (note); *Saunderson v. Griffiths* (1826), 5 B. & C. 909; *Keighley Maxsted & Co. v. Durant*, [1901] A.C. 240;

App. Div.
1917

Boston Fruit Co. v. British and Foreign Marine Insurance Co.,
[1906] A.C. 336.

MORTIMER

v.

FESSERTON
TIMBER CO.
LIMITED.

Hodgins, J.A.

June 12. HODGINS, J.A.:—Appeal by the defendant company from the judgment of the late Chancellor Boyd, declaring that the respondent, assignee, is entitled to hold as trustee for creditors the mortgage given by the debtors to the appellant company, and that the mortgage is available for the ratable payment of all creditors of the firm of Richard Smith & Son.

This judgment is based upon the finding of the learned trial Judge that the meeting between the debtors and their three principal creditors at the Walker House in Toronto on the 21st July, 1914, resulted in an arrangement by which the three creditors formed themselves into a committee to look after the affairs of the debtors upon the basis that all the creditors were to be paid *pro ratâ*.

This finding rests upon contradictory evidence. Two of the creditors are clear that it was advisable to avoid an assignment, and that an agreement as found by the Chancellor was made at this meeting. Carter, the third creditor, and his salesman, Brooks, deny any binding arrangement, and in this they are supported by Richard Smith and his son. But indications are given throughout the evidence that those that were present at the meeting did not part without some definite understanding. Carter, president of the appellant company, admits that he knew that other people were refraining for a month or so on account of the discussion at the Walker House, while Smith and his son say that, when the mortgage was demanded, the reason given was, that the appellant company had not been getting its proper proportion of the payments, and that the appellant company was to get the same proportion as the other creditors—"that was the understanding." Carter says "perhaps" this was what he said. Smith adds, "If we could clean Mr. Carter up to a certain extent he would release the mortgage;" and repeats this again while professing inability to state what amount, if any, was agreed upon. Mr. Carter was not called to deny this. I do not find this latter bargain developed in the evidence. Smith junior, in answer to a question as to discharging the mortgage when something was paid on it, replies that "there was an agreement attached to it. I don't know about that."

In the mortgage itself, however, appears this clause: "It is further declared and agreed that this indenture is subject to the provisions of an agreement bearing even date herewith made between the mortgagee and the mortgagor, and which said agreement is incorporated herein."

It would be impossible, I think, upon the whole evidence, to disturb the finding of the Chancellor. There was before him a choice between a loose and informal assent by the three creditors at the request of the debtors to wait a while, and a more definite arrangement by which those most largely interested agreed to supervise the debtors' affairs and to see that all creditors were treated alike. The latter alternative has been accepted, and is consistent with the subsequent action of all parties.

Upon the argument it was pointed out that the respondent, as assignee, was only empowered by the statute to take action to set aside transactions made or entered into in fraud of creditors or in violation of the Assignments and Preferences Act, R.S.O. 1914, ch. 134. It was said that this transaction was not covered by that provision. It may be that the preference which was given by this mortgage, while unjust if regarded in the light of the arrangement of the 21st July, 1914, is not strictly within the provisions of the Act. It is not necessary to determine that now, because the assignee would, at all events, succeed to the right of the debtors to be relieved from the mortgage, upon payment of whatever was the stipulated amount referred to in the evidence of Smith.

Application was made to add a creditor as a party plaintiff and to amend by claiming in this action relief on behalf of all creditors. I see no reason why this should not be granted, if provision is made for carrying out the arrangement originally made, as found by the Chancellor, *i.e.*, payment *pro rata* to all the creditors, except the small ones, who might be paid in full. This is not a case of a plaintiff having no claim at all, and another being substituted.

I quite realise the force of the objection that the three agreeing creditors did not in fact take the trouble to see that they and the other creditors were dealt with, after the arrangement was made, in accordance with it. No trust, however, had been created; there was nothing for it to operate upon, as the assets remained the

App. Div.
1917

MORTIMER
v.
FESSERTON
TIMBER Co.
LIMITED.

Hodgins, J.A.

App. Div.
1917
—
MORTIMER
v.
FESSERTON
TIMBER Co.
LIMITED.
—
Hodgins, J.A.

debtors'. It would of course be impossible to make any present order requiring the creditors not before the Court to refund, nor direct them to account for moneys received in the ordinary course of business, without actual notice of the arrangement. But that does not touch the point that the appellant company, in face of its agreement, has obtained an advantage which is inconsistent with the relation it has been found to occupy. If it intended to fend for itself, it was bound to terminate the situation to which it was committed. The arrangement between the debtors and these creditors was intended for the benefit of the body of creditors, but it included, so far as the three were concerned, a self-denying ordinance, restricting each to *pro rata* payments, in consideration that the others refrained from pressure or suit against the debtors. This consideration was sufficient to uphold the bargain. No other creditors may have had knowledge of the arrangement, but it existed nevertheless, in full force, and would benefit them if loyally acted upon. It is sufficient to disable any one of the three creditors from securing an advantage which could only be gained owing to the restraint imposed on the other two parties.

There is no difficulty in determining that, so far as it can be done, the security shall form part of the assets which it is the duty of the respondent to distribute *pro rata*. An account can be taken of the creditors' claims on the 21st July, 1914, and those who elect to take advantage of the scheme then settled upon can prove their claims with the respondent. If any have received more than their proper proportion, they must, unless they agree to refund, be excluded from the benefit of the security. While the two other creditors who participated in the agreement are not before the Court, they, like the appellant company, can be compelled by the respondent to account upon similar terms, if they do not do so voluntarily. The difficulties in working out this relief afford no reason for not granting it so far as it can be done.

The judgment as entered does not carry out the underlying idea to be found in the opinion expressed at the close of the case. It would be unfair to the appellant company if the mortgage were vested in the respondent for the benefit of creditors upon the basis existing at the date of the assignment, if in fact the appellant company had not then received its right proportion in reduction of its claim.

The proper course will be to declare that the respondent will hold the mortgage in the first place to equalise the claims of creditors as existing on the 21st July, 1914, having regard to the foregoing, and excepting the small creditors who may have been paid in full, taking into account the payments made, but excluding from consideration goods supplied after that date and payments specifically applied thereon, and then for the general benefit of all creditors who file claims with the assignee. His allowance of the claims so far as this security is concerned will depend on their accounting for their due proportion of overpayment, if any.

The exact modification in the terms of the judgment may be spoken to when the parties have worked out in a general way the financial difference which this will occasion in the respective claims of the appellant company and the other creditors. The proposed creditor may be added as a party plaintiff on filing his consent.

There should be no costs of this appeal.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

FERGUSON, J.A. (dissenting).:—This is an appeal by the defendant the Fesserton Timber Company Limited from a judgment pronounced by the late Chancellor, after a trial at Toronto non-jury sittings, on the 17th November, 1916.

On the appeal, the respondent applied for leave to add a creditor of Richard Smith & Son as a party plaintiff.

The grounds of action are concisely declared in the statement of claim, which reads as follows:—

“1. The plaintiff is an assignee residing and carrying on business in the city of Niagara Falls, in the county of Welland, and the defendant company is a corporation having its head office in the city of Toronto, in the county of York, and the defendant Smith resides in the city of Niagara Falls, in the county of Welland.

“2. For some time prior to July, 1914, the above named Richard Smith and Richard J. Smith carried on business as general contractors and lumber-merchants in the city (formerly the town) of Niagara Falls, in the county of Welland, under the firm name and style of Richard Smith & Son.

“3. In or about the month of July, 1914, the said Richard Smith & Son were indebted to a large number of creditors, amongst

App. Div.
1917
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.
Hodgins, J.A.

App. Div.
1917
—
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.
—
Ferguson, J.A.

others the defendant company, in the sum of \$28,000 and upwards, and in order to complete certain contracts were required to incur further liability to about the sum of \$13,000, and, by reason of said indebtedness and said contractual obligations, were requesting the defendant company and other creditors for an extension of time within which to pay such indebtedness.

"4. Pursuant to such request, one W.W. Carter, president of the defendant company, together with others, namely, John Donogh, W. R. Stephens, and J. McNab, was duly appointed and requested by and on behalf of the creditors of the said Richard Smith & Son to advise the said Richard Smith & Son from time to time with regard to carrying on the business of the said firm, and to act for and on behalf of the creditors of the said firm in carrying on their said business in the same respect as inspectors of an estate being liquidated by an assignee pursuant to the Assignments and Preferences Act.

"5. On or about the 1st day of February, 1915, the defendant company, well knowing the financial obligations of the said Richard Smith & Son, and that the said firm were in fact, as the plaintiff alleges, in insolvent circumstances and unable to pay their debts as they became due, in fraud of the other creditors of the said Richard Smith & Son, obtained from the said defendant Richard Smith a certain mortgage, made by the said defendant Richard Smith and wife to the defendant company, and bearing date the 1st day of February, 1915, as collateral security for the sum of \$4,806, and in respect of all and singular that certain parcel or tract of land situate, lying, and being in the city (formerly the town) of Niagara Falls, in the county of Welland, and being composed of lots 5, 6, and 35 according to plan number 747, which mortgage was duly registered in the registry office in the county of Welland on the 17th day of February, 1915, as number 8846 for the city of Niagara Falls.

"6. The plaintiff alleges that the said Richard Smith & Son were on the 1st day of February, 1915, insolvent and unable to pay their debts as they became due, to the knowledge of the defendants, and that the defendant company stood in a fiduciary relationship to the said Richard Smith & Son and the other creditors of Smith & Son by reason of the appointment of its president, W. W. Carter, as set out in paragraph 4 hereof.

"7. The plaintiff further alleges that the mortgage made to the defendant the Fesserton Timber Company Limited as aforesaid was made by the said defendant Richard Smith as a partner of the firm of the said Richard Smith & Son, at a time when the said firm was in insolvent circumstances and unable to pay its debts in full, and was made with the intent to give the said defendant the Fesserton Timber Company Limited an unjust preference over the other creditors of the said Richard Smith & Son, and the said mortgage had the effect of giving the said defendant a preference over the other creditors of the said Richard Smith & Son.

App. Div.
1917
—
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.
—
Ferguson, J.A.

"8. That on or about the 5th day of January, 1916, the said Richard Smith & Son, under and by virtue of a certain indenture made pursuant to the Assignments and Preferences Act, made an assignment of all their estate to the plaintiff for the general benefit of their creditors.

"9. The plaintiff therefore claims:—

"(1) A declaration that the said mortgage is fraudulent and null and void as against the creditors of the said Richard Smith & Son.

"(2) That the said mortgage be set aside.

"(3) In the alternative, for a declaration that the plaintiff is entitled to hold the said mortgage as trustee for and on behalf of the creditors of the said Richard Smith & Son and as assignee for the benefit of creditors of the said Richard Smith & Son under and pursuant to the Assignments and Preferences Act.

"(4) Such further and other relief as to this Court shall seem meet or the nature of the case require."

The learned trial Judge did not find for the plaintiff on the cause of action alleged in paragraphs 5, 7, 8, but on that stated by paragraphs 2, 3, 4, and 6. The material part of the Chancellor's finding is:—

"The cardinal and important point in this case is, that a meeting was called in July of 1914, by Messrs. Richard Smith & Son, of Niagara Falls, Ontario, who were in financial difficulties and desired to get the advice of their *chief creditors* at the time, and an invitation was given to them to attend the meeting.

"The meeting was held on the 21st July, 1914, at the Walker House, Toronto, and it is of importance to consider what the result of the meeting was.

App. Div.
1917
—
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.
—
Ferguson, J.A.

“What was the effect of that meeting? It is quite true, as it is argued, that there was no formal committee or inspectorship proposed. But the real meaning of the thing was, that these three creditors (as I think the expression is put up by Mr. Eckhardt), the firms of the Donogh Lumber Company, the Laidlaw Lumber Company, and the Fesserton Timber Company, constituted or formed themselves into a committee to look after the affairs of Smith & Son. They were going to see if their claims and the claims of the other creditors could not be looked after, and so avoid the calamity of an assignment, which at that time, they said, would have been fatal to all their hopes.

“It was part of the agreement arrived at at that meeting, I have no manner of doubt, that the creditors were to be paid *pro rata*. That is Mr. Eckhardt’s expression.

“I consider it as not fair play, not playing the game, when three merchants, honest and honourable men, meet together and make an arrangement such as this with a fellow-merchant that he is to pay ratably, making no preferences, and one of their number obtains the advantage of a mortgage on all the real property of the one man or of the one firm. I think there is a strong claim for equitable dealing in this case, and I think the security should be made available for the benefit of all creditors. There will be judgment accordingly.”

The declaration of relief granted by the formal judgment reads as follows: “1. This Court doth declare that the mortgage in the pleadings mentioned is available for the ratable payment of all creditors of the above named Richard Smith and Richard J. Smith, carrying on business under the name and style of Richard Smith & Son, and that the plaintiff is entitled to hold the said mortgage as trustee for and on behalf of and as assignee for the benefit of the said creditors, and doth order and adjudge the same accordingly.”

Reading the evidence and exhibits in the light of the surrounding circumstances, as outlined in the transcript of evidence, I would not myself arrive at the same conclusions as the trial Judge, but there was evidence on which he could make the finding he did. He had the advantage of observing the demeanour and manner of the witnesses; it is not always what is said, but at times the way it is said, that impresses, and should impress, the trial Judge.”

In the opinion of the Privy Council in *Wood v. Haines* (1917), 38 O.L.R. 583, 33 D.L.R. 166, this Court is reminded of the importance of keeping that in mind, and of not lightly accepting the responsibility of differing from the trial Judge when his findings are based on the credibility of witnesses. In view of this rule thus re-stated by the Privy Council, I accept the Chancellor's findings of fact.

As I read the findings, it is an essential part of the agreement as found that *all* creditors, except the small ones, should be paid ratably and proportionately on the basis of their claims at the date of the making of the agreement in July, 1914. Therefore the agreement (if effective) bound the debtors not to pay, and bound not only the three creditors present at the meeting when the agreement was made, but *all other creditors* (except the small ones), not to receive payment, other than ratably and proportionately. It is not alleged or proved that the *other creditors* (and there were a number of them) either expressly or impliedly assented to or even knew of the alleged agreement, and I cannot see how such an agreement can be held to be binding upon and effective or enforceable against either the three who made it, or the other creditors who were to benefit or be restricted by it, until it was completed by the acceptance of the other creditors. The subsequent conduct of the parties is inconsistent with there being any assent or effective agreement.

The exhibits shew that between the date of the agreement in July, 1914, and the assignment for the benefit of creditors in January, 1916, payments by the debtors were not made ratably and proportionately. In July, 1914, the Royal Bank was a creditor for \$5,000; at the date of the assignment it had been paid in full. Counsel for the appellant company prepared and put in a memorandum of payments made to the other creditors down to May, 1915. This memorandum appears to be in accordance with the evidence and exhibits, and is as follows:—

“For evidence as to how payments were actually made subsequent to statement of July 23/14 (exhibit 2) see statement of January 27/15 (exhibit 6), statement of May 22/15 (exhibit 1), amount of creditors' account as shewn in statement of July 23/14 (exhibit 2) being subject to the corrections shewn in evidence of McNab, pages 129 and 130.

App. Div.
1917
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.
Ferguson, J.A.

App. Div.
1917
—
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.
—
Ferguson, J.A.

"The claims of the Fesserton Timber Company, of which Mr. Carter is president, the Donogh Lumber Company, and the Laidlaw Lumber Company, which was represented by Mr. Eckhardt, from time to time, were as follows:—

	July 23/14	Jan. 27/15	May 22/15
Fesserton.....	\$6,950	\$4,806	\$4,707
Donogh.....	3,300	2,209	1,882
Laidlaw.....	1,805	1,105	1,112

"The percentage of reduction of the three claims up to January 27/15 was respectively 20.7%, 33%, 38.8%. The subsequent percentage of reduction of these claims up to May 22/15 was respectively 2%, 14.8%, 0%. The average reduction for the whole period from July 23/14 to May 22/15 was as follows:— 32.26%, 43%, 38.4%.

"As to the other creditors, it would appear that a number were entirely paid off before the fire, and that some large accounts were almost paid off. For instance, J. M. Divers' account on July 23/14 was \$1,189. On January 27/15, this had been reduced to \$191.94, and on May 22/15 to \$100. John Fenderson's account upon the said dates was respectively \$736, \$400, \$250. Knight Manufacturing Company's account on the same dates was respectively \$500, \$150, \$51. The bank appeared as a creditor on each of the said three statements," and is now paid off.

Can it be conceived that the bank, which has received payment in full of its claim for \$5,000, Divers, who has received \$1,100 out of a claim of \$1,200, Fenderson, who has received \$500 out of \$750, and Knight, who has received \$450 out of \$500, were bound by that agreement and can now be forced to accept ratable distribution on the basis of their claim in July, 1914, or would elect to do so; or that the plaintiff and the defendants, even with the assistance of a favourable Court, can force them to do so? I think not. And, clearly, to attempt to do so in their absence is, to my way of thinking, impossible. Even the two creditors with whom the defendants are alleged to have entered into the agreement are not parties to the action. The creditors, other than the appellant company, cannot have their cake and eat it too. It would be unfair for them to have the benefit of the payments and securities obtained by the appellant company unless they account to it and give it the benefit of the payments they have received.

If it was part of the agreement that *all creditors* should be paid ratably and proportionately, it would be a most material alteration, going to the very purpose and root of the transaction, to give effect to the agreement as to only one, two, or three creditors, and to give the agreement no effect as to the numerous other creditors; and it would be neither fair nor equitable to permit, say the creditor Divers, to receive the benefit of the appellant company's security to obtain a further payment on his claim on which he had already been paid over 90 per cent. as against 32 per cent. paid the appellant company. I am, therefore, of the opinion that the plaintiff in respect of the cause of action upon which the Chancellor granted relief, should, for the following reasons, fail: (1) that it would be inequitable to make the agreement effective as to the appellant company and not as to all other creditors; (2) that the agreement cannot be carried out in the absence of or without the consent of all creditors; (3) that the payments made contrary to the terms of the agreement and the debtors' insolvency have made it impossible to perform the agreement; (4) that in any event these breaches of the agreement took away from the debtors, and the plaintiff as their assignee, any right they might have had to ask specific performance; (5) that, in the action as at present constituted, it is not now, if possible, fair to conclude without a trial that the other creditors had a right to enforce the contract and have not by subsequent acts or happenings lost that right or made it inequitable for them to enforce the contract.

The other cause of action of the plaintiff, alleged in paragraph 7 of his claim, and on which it is sought to uphold the judgment, was not expressly dealt with by the learned trial Judge. To succeed on that cause of action, the plaintiff must shew: (1) insolvency; (2) knowledge by the creditor of insolvency; (3) unjust preference; (4) intent on the part of the debtor to prefer; (5) concurrence in such intent on the part of the creditor; and, as the assignment was not made within 60 days, the onus was on the plaintiff, and pressure was an answer.

I do not here intend to set out the evidence on which I rely in arriving at my conclusions; but, after a perusal of the evidence and exhibits, I am of opinion that neither the debtors nor the

App. Div.
1917

MORTIMER
v.

FESSERTON
TIMBER Co.
LIMITED.

Ferguson, J.A.

App. Div
1917
—
MORTIMER
v.
FESSERTON
TIMBER CO.
LIMITED.
—
Ferguson, J.A.

creditor considered the debtors insolvent; both thought that, if given time, the debtors would, in the absence of unforeseen or unfortunate happenings, such as the fire which subsequently occurred, pull through with a substantial surplus, and neither had any intent to give or receive a preference. The debtors yielded to the creditor's request for the collateral security, and the creditor made the request to protect it against the debtors paying the others before it, as it alleged, and as the facts shewed, was being done, and as against accident and unforeseen happenings such as the fire, believing however that all was well and would be well with the debtors.

The authorities shewing what the attacking party has to make out are well collected and digested in Mr. R. S. Cassels' work on the Ontario Assignments Act, 4th ed. (1914), pp. 10 to 15. I think the plaintiff has, on this cause of action, also failed to make out a case for relief.

There remains to be dealt with the application to add a creditor as a party plaintiff.

The assignment for the benefit of creditors (exhibit 7) grants to the assignee "all their (the debtors') personal property which may be seized and sold under execution and all their real estate, credits, and effects." Section 8 of the Act says that an assignment in this form shall vest in the assignee "all the real and personal estate, rights, property, credits, and effects, whether vested or contingent, belonging to the assignor at the time of the assignment, except" exemptions from seizure, etc. Therefore, if Smith & Son were parties to the agreement (and I so read the finding), that assignment is wide enough to vest in the plaintiff, Smith & Son's right to enforce it; and, in that view, it is not necessary to add a party. But, if Smith & Son, having had the right to enforce the contract, by breach lost that right, and I think that, by making payments other than ratably and proportionately, they did lose it, or, if Smith & Son were not parties to the agreement, then I am of opinion that the assignment did not vest in the assignee a creditor's right to enforce it. It is only by sec. 12 of the Act, if at all, that a creditor's cause of action can be vested in the assignee, and that section is limited to actions not for enforcement of agreements but for rescission of agreements entered into in fraud of the creditors or in violation of the Act; and the agreement as found or

alleged cannot be said to be an agreement entered into in fraud of the creditors; and, therefore, if the plaintiff cannot maintain his action by virtue of an assignment of the right to do so from Smith & Son, he would have no cause of action on the agreement, and to grant his application would be contrary to the principle stated by Mr. Justice Riddell in *Colville v. Small* (1910), 22 O.L.R. 426, where he stated (p. 429) "that the Rules" (206 and 313, of which the present Rule 134 is a consolidation) "never were intended to cover a case in which the actual plaintiff has no cause of action, but it is suggested some one else may have."

For these reasons, I would refuse the application to add a party plaintiff, with costs, and would allow the appeal with costs and dismiss the action with costs.

Judgment of the Chancellor affirmed, with a variation;
FERGUSON, J.A., *dissenting.*

App. Div.
1917
—
MORTIMER
v.
FESSERTON
TIMBER Co.
LIMITED.
—
Ferguson, J.A.

[APPELLATE DIVISION.]

ROBLIN v. VANALSTINE.

1917
—
June 12.

Promissory Note—Death of Payee on Date of Maturity—Dishonour—Renewal by Note in Favour of Husband of Payee—Delivery up of Original Note—Action on Renewal by Endorsee of Husband after Maturity and Dishonour—Title to Note—Consideration—Fraud—Right to Transfer Note—Bills of Exchange Act, sec. 138—Equities—Disposition of Original Note.

The plaintiff sued upon a promissory note made by the defendant, and endorsed to the plaintiff after maturity. The note was payable to D., and was a renewal of an earlier note made by the defendant in favour of D.'s wife, who died on the date of its maturity. This note was then in a bank, where it had been deposited for collection. It did not appear in what manner D. obtained possession of it; but he brought it to the defendant, some days after its maturity; she then made the new note in renewal of it, and he gave her the old note. D. was not examined as a witness, nor was the manager of the bank, but a statement from him was, by consent, put in as his evidence—that the first note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. D. "unless otherwise instructed."

Held (MAGEE and FERGUSON, J.J.A., *dissenting*), that the proper inference was, that the bank held the first note up to the date of its maturity in trust for Mrs. D., and, after her death, for her estate, in the absence of further instructions from her; and, as D. obtained possession of the note only after its maturity and dishonour, he took it subject to the same trust, and so had only a defective title.

D.'s title was not improved by obtaining the new note: the same defence may be set up to a renewal as to the original note.

The giving up of the first note was not a valid consideration for the renewal, as it did not release the defendant from liability to the estate of Mrs. D.

1917
ROBLIN
v.
VANALSTINE.

The plaintiff, who acquired the note sued on after maturity and dishonour, stood in no better position than D.

The note was, in the hands of the plaintiff, subject to the further equity that it was obtained by fraud: it was not shewn that D. had the right to transfer it—the contrary appeared: Bills of Exchange Act, sec. 138.

The defendant, being released from payment of the renewal note, was not entitled to receive back the original note, which was in Court as an exhibit: it should not be given out except upon the order of a Judge and to the person entitled to its possession. ✓

AN appeal by the defendant from the judgment of the Judge of the County Court of the County of Lennox and Addington, in favour of the plaintiff, in an action for the balance due upon a promissory note made by the defendant on the 26th June, 1912, for \$300, payable three months after date, to the order of one W. H. Davis, and endorsed by him. The judgment as settled was for the recovery of \$231.58.

February 20. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

W. S. Herrington, K.C., for the appellant, argued that the evidence shewed that there was no consideration for the note. In any event, if the plaintiff should be considered entitled to a judgment, it could be for only \$225, and not for \$284.75, as found by the trial Judge.

W. N. Tilley, K.C., for the plaintiff, respondent, argued that the giving up of the original note was a consideration for the new promise. The old note was endorsed by Hannah E. Davis in blank; and, when the bank gave it back to the husband, the presumption was, that he was entitled to receive it. A payment had been made on account of the note, and an extension of the time for payment had been granted.

Herrington, in reply.

June 12. MACLAREN, J.A.:—This is an appeal by the defendant from a judgment of the Judge of the County Court of the County of Lennox and Addington for \$231.58, balance due on a promissory note of the defendant of the 26th June, 1912, for \$300, payable in three months, to the order of W. H. Davis, and endorsed by him.

This note was a repewal of one for the same amount dated the 6th May, 1912, payable to the order of Hannah E. Davis, one month after date, which was endorsed by the payee and placed

for collection in the Bank of Montreal at Picton, where by its terms it was made payable. Hannah E. Davis died on the 9th June, the day the note became due. W. H. Davis was her husband. He was not examined as a witness. There is no evidence as to when or how he obtained possession of the note of the 6th May, 1912; but he had it in his possession on the 26th June, 1912, when he delivered it to the defendant, on getting from her the renewal note now sued upon.

The manager of the Bank of Montreal at Picton was not examined as a witness; but a statement was agreed upon, and, signed by both counsel, was put in as his evidence: "that the first \$300 note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. Hannah E. Davis unless otherwise instructed."

I think the only proper inference from this evidence, under the circumstances, is, that the bank held the first note up to the date of its maturity in trust for Hannah E. Davis, and, after her death on the 9th June, for her estate, in the absence of further instructions from her. There is no evidence as to when or how W. H. Davis obtained possession of the note; but, as he obtained it only after its maturity and dishonour, he took it subject to the same trust, and consequently had only a defective title.

His obtaining from the defendant a new note on the 26th June would not improve his title or strengthen his position. The same defence may be set up to a renewal as could have been urged against the first note: Byles on Bills, 17th ed., p. 164; Daniel on Negotiable Instruments, 6th ed., sec. 205.

The giving up of the original note did not form a valid consideration for the renewal, as it did not release the defendant from her liability to the estate of Hannah E. Davis. It does not appear that Hannah E. Davis left a will, but she left a son, who is still under age, and no administration was taken out to her estate. The plaintiff acquired the note only in May, 1915, nearly three years after its maturity and dishonour, so that he does not stand in any better position than did W. H. Davis, who, so far as appears, never had any right or title either to the original note or the renewal.

In addition it may be urged that the note now sued upon is,

App. Div.
1917
ROBLIN
v.
VANALSTINE.
Maclaren, J.A.

App. Div.
1917
ROBLIN
v.
VANALSTINE.
Maclaren, J.A.

in the hands of the plaintiff, subject to the further equity that it was obtained by fraud, inasmuch as he only became the holder nearly three years after it became due and was dishonoured. Although W. H. Davis did not endorse the original note, he became subject, under sec. 138* of the Bills of Exchange Act, R.S.C. 1906, ch. 119, to all the warranties of a transferrer by delivery, namely, that the note was what it purported to be; that he had a right to transfer it; and that at the time of the transfer he was not aware of any fact which rendered it valueless. It is not shewn that he had a right to transfer it, but the contrary appears. In view of what is proved, the onus was upon the plaintiff to prove that W. H. Davis had a right to transfer the note, and he did not produce Davis as a witness, nor did he offer any other evidence to this effect.

In my opinion, the appeal should be allowed and the action dismissed with costs.

As the defendant has been released from the payment of the renewal note, she is not entitled to receive back the original note. It should not be given out except upon the order of a Judge and to the party entitled to its possession, presumably to the administrator of the estate of Hannah E. Davis, when such administrator is appointed, and the defendant will not be entitled to set up this judgment as a defence in any action or proceeding against her by a legal holder of the original note.

MEREDITH, C.J.O., and HODGINS, J.A., agreed with MACLAREN, J.A.

MAGEE, J.A. (dissenting):—The plaintiff, as endorsee of W. H. Davis, sues the defendant, as maker of a promissory note for \$300, dated the 26th June, 1912, payable three months after date, to W. H. Davis or order. By the writ of summons the plaintiff claimed \$284.91, being the balance of principal, with interest from the date of the note, after giving credit for \$75 paid on the

*138. A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value,—

(a) that the bill is what it purports to be;

(b) that he has a right to transfer it;

(c) that at the time of the transfer he is not aware of any fact which renders it valueless.

12th May, 1915. The learned trial Judge in his reasons for judgment states that "the defendant admits making the note and that the amount claimed by the plaintiff is unpaid;" and he gave judgment for the full amount, \$284.91. The defendant, while disputing any liability to the plaintiff, now claims that this amount is erroneous and should be reduced by the amount of the interest up to the 15th May, 1916. Before giving notice of appeal, her solicitor by letter asked the plaintiff's solicitor to consent to such reduction in accordance with the endorsement by W. H. Davis which was on the note when the plaintiff acquired it. The plaintiff's solicitor refused to consent. An affidavit of the defendant's solicitor was filed and read on the appeal, which stated: "When the plaintiff's said solicitor refused to correct what I believed to be an error, I, on the 9th January, 1917, ordered copies of the evidence herein and caused to be served a notice of appeal, claiming that the learned trial Judge erred in directing judgment to be entered for the sum of \$284.91," and that "before the 24th January, 1917, . . . I had requested my agents to take the necessary steps to set down this appeal, and on the 26th day of January, 1917, the minutes of judgment were settled, and then the plaintiff's solicitor conceded that I was right in my contention as stated in my letter . . . and consented that judgment be entered for the amount claimed by me to be the true sum unpaid upon said promissory note sued upon herein." A consent was signed by both solicitors, dated the 26th January, 1917, which reads: "Upon discovering to-day that there is a slight clerical error in the calculation of the interest due on the promissory note . . . we hereby consent that in settling minutes of judgment . . . the amount for which judgment be entered be \$231.58."

The defendant, however, also appealed upon other grounds. As set forth in her affidavit which stands as her pleading, she alleged: (1) that the plaintiff had no beneficial interest and was suing purely for the benefit of W. H. Davis, the payee; (2) that the note was obtained from her by misrepresentation by W. H. Davis; and (3) was without consideration; (4) that W. H. Davis gave no value for the note; (5) that the note, if transferred at all to the plaintiff, was transferred after it became due; (6) that any indebtedness, if any existing, in respect of the considera-

App. Div.
1917
ROBLIN
v.
VANALSTINE.
Magee, J.A.

App. Div.
1917
ROBLIN
v.
VANALSTINE.
Magee, J.A.

tion of this note, was the property of Hannah E. Davis, deceased, who died on the 9th June, 1912, intestate, and no administration to her estate has been granted by any Surrogate Court; and (7) that the plaintiff had notice of these facts before he took the note.

It appears that on the 6th May, 1912, the defendant had, for value, made and delivered to her sister, Hannah E. Davis, who was the wife of W. H. Davis, a promissory note for \$300, payable one month after date at the Bank of Montreal, Picton, to the order of Hannah E. Davis. The latter endorsed the note in blank, and at some time before it became due it was placed in the Bank of Montreal at Picton for collection. The bank-manager was not called as a witness, but a short and unsatisfactory memorandum of his statement was by consent put in as being his evidence. It reads: "that the first \$300 note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. Hannah E. Davis unless otherwise instructed." That is all, and it does not appear from whom the bank received it, or upon whose instructions he would have credited Mrs. Davis, or by whom he might be otherwise instructed. It does not appear when or how the bank parted with it. It cannot be presumed that the bank parted with it wrongfully. It must be fairly implied that the bank must have been the holder during the life of Mrs. Davis. She died on the 9th June, 1912, the day the note matured. She was in fact ill in bed at the time the note was made. She left her husband and one child, Carl, now 19 years old, surviving her. It does not appear whether she left any will, or whether any letters of administration of her estate have been issued. The only reference to that at the trial is the defendant's statement: "I do not know if Hannah E. Davis left a will nor that (*sic*) any probate or letters of administration having (*sic*) been issued in respect to my deceased sister's estate."

The defendant apparently had some notification from the Bank of Montreal, for she says, "I have only heard from the bank and W. H. Davis about exhibit 6" (the note of the 6th May, 1912.) She also says, "I received notice from W. H. Davis that note was in that bank." She admits her sister's

signature in the endorsement of the note, and she says, "This exhibit 6 was placed in the Bank of Montreal for collection." It must, I think, be taken that the note had become payable to bearer. It may well be that Mrs. Davis was still the person beneficially entitled; but, so far as appears, her husband or the bank may successively have been, and the bank was, the bearer of it, even though in trust for her, and not merely the custodian of it, but entitled to bring action upon it as the holder.

Then the defendant's evidence is: "I gave the last note (exhibit 1) to W. H. Davis . . . I received note (exhibit 6) from W. H. Davis, who told me that the Bank of Montreal would sue me unless I paid exhibit 6 or renewed it. It frightened me into giving him the other note. I received nothing from W. H. Davis except exhibit 6. I have not received any release from the estate of Hannah E. Davis in regard to my liability upon my note exhibit 6 . . . I gave first note exhibit 6 to pay this sum of \$300 . . . Exhibit 1 is a renewal of note exhibit 6. He came to me and frightened me into giving this note . . . W. H. Davis gave up to me exhibit 6 when I gave him exhibit 1. This note exhibit 6 has been in my possession ever since. I have received no demand from my nephew in respect to this note, and I do not expect any, but my solicitor told me he might do so."

Her solicitor was called as a witness and said: "I won't say but that I first suggested to the defendant that Carl might come on her for payment of this note."

If his wife left a will, W. H. Davis may well have been executor. If she died intestate, he was the person *primâ facie* entitled to administration. If he was acting only as executor *de son tort*, he may or may not have paid liabilities of his wife which he would be entitled to set up against moneys received for her estate. If he held the note as trustee for her, his trusteeship would not be ended by her death. Her first note produced from the defendant's custody has marked upon its face: "Cancelled by duplicate note. W. H. Davis."

W. H. Davis does not appear to have pressed for payment afterwards until May, 1915. The defendant says, speaking of that date: "W. H. Davis came to me and asked me to pay the note, and I said 'no,' and he then asked me to lend him some

App. Div.
1917

ROBLIN
v.
VANALSTINE.
Magee, J.A.

App. Div.
1917
ROBLIN
v.
VANALSTINE.
Magee, J.A.

money." And she goes on to say that the \$75 endorsed on the note was not a payment on the note but a loan to him. She says this in the face of the receipt given her at the time by John C. Davis, an uncle of W. H. Davis, to whom the \$75 was paid on the 19th May, 1915; and the learned trial Judge has not believed her and has found against her on the fact.

Then W. H. Davis endorsed the note to the plaintiff, a relative, who paid him for it the full balance of principal, \$225. W. H. Davis then stipulated with the plaintiff that he was not to ask payment of the note for a year, and then paid the plaintiff a year's interest on it, and the plaintiff kept to the arrangement. The plaintiff, whose evidence the learned trial Judge accepts against the defendant's, says that, when in May, 1916, he did apply to the defendant for payment, she complained that when she offered to give W. H. Davis \$75 he had agreed not to bother her for a time for the balance. So that, according to her own story, when the plaintiff became the holder, the time for payment of the money was still current.

No evidence has been given on either side as to the actual payment of interest, but the note in the plaintiff's hands bears this endorsement, signed by W. H. Davis, immediately below the endorsement of the \$75 payment: "Interest paid on this note to May 15, 1916. W. H. Davis." It is this interest up to the latter date which the plaintiff claims to have been paid, and the non-allowance of which apparently led to this appeal. It would not be too much to assume against her that she had not only paid \$75 of principal, but the four years' interest as well, though the probability is that W. H. Davis was considerate towards his sister-in-law and did not ask interest. It also seems probable that the objection urged against the plaintiff's title is a last effort to gain further time for payment of the debt.

The learned trial Judge finds that the plaintiff took the note in good faith and for valuable consideration, namely, \$225, and without any notice of any defects, if any, in W. H. Davis's title thereto, and that he had no knowledge or suspicion of any of the matters set up by the defendant in her defence. He also finds that the second note was not obtained by misrepresentation or duress, and he says the defendant has failed to establish that W. H. Davis was not the holder in due course of either note.

In this I would agree with him. It is clearly a case for considering the onus of proof. On the evidence, the defendant stands in no danger of being held liable upon the first note. It was presented to her, by the bearer of it, for payment, in a condition in which it was payable to bearer, and she paid it to the bearer by giving a new note and having it given up to her cancelled. Had W. H. Davis sued upon it as bearer, I cannot see that, upon the evidence here, the defendant could successfully have resisted payment. Much less could she, upon the same evidence, have resisted payment of the second note at his suit. There is, to my mind, an entire absence of proof of the untruth of any express or implied representation by W. H. Davis. Assuming that the plaintiff, taking the note after maturity, takes it, under sec. 70 of the Bills of Exchange Act, subject to any defect of title affecting it at its maturity, there is here no proof of defect of title in W. H. Davis, the payee. Substantially the defence may be put upon two grounds—fraud and absence of consideration. If fraud were proved, the evidence shews that the defendant elected to condone the fraud by paying part and getting an extension of time for the balance, to say nothing of payment of interest if it was paid, and this with full knowledge of every fact which she now brings before the Court.

As to absence of consideration, the first of the two distinct points upon which the Vice-Chancellor in *In re Overend Gurney & Co., Ex p. Swan* (1868), L.R. 6 Eq. 344, at p. 367, rested his decision, is thus stated by him: "That an endorsee or transferee for value of a bill of exchange after dishonour, has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it." Section 70 of the Bills of Exchange Act makes the plaintiff take the note subject to "any defect of title affecting it at its maturity," and it is noticeable that sec. 56, which declares that a holder in due course must be one who has no notice of any defect in the title, mentions in particular as defects in title the obtaining of the bill by fraud, duress, from fear and unlawful means, or for an illegal consideration or a breach of faith or fraud in negotiating, but does not mention absence of consideration. But, as I do not think there was any proof of absence of consideration, it is unnecessary for me to deal with it.

App Div
1917
ROBLIN
v.
VANALSTINE
Magee, J.A.

App Div
1917

ROBLIN
v.

VANALSTINE

Ferguson, J.A.

The decision appealed from was, in my view, right, and the appeal should be dismissed, but without costs of the appeal incurred before the consent to reduce the amount of the judgment.

FERGUSON, J.A. (dissenting).—This is an appeal by the defendant from a judgment pronounced at the trial by His Honour Judge Madden, Judge of the County Court of the County of Lennox and Addington, whereby he directed judgment to be entered for the plaintiff for the sum of \$231.58, as the balance due on a promissory note for \$300, dated the 26th June, 1912, made by the defendant, payable three months after date, to the order of W. H. Davis, and endorsed by him.

W. H. Davis held the note till the 12th May, 1915, having in the meantime received \$75 on account of principal, and he then, according to the evidence, endorsed it over to the plaintiff in consideration of \$225.

The defendant on her examination for discovery admitted the making of the note and the non-payment thereof, and the plaintiff proved his purchase and the endorsement thereof by W. H. Davis, and thus made out his case.

The defences set up by the affidavit filed with the appearance to a specially endorsed writ were: that the note was given without consideration; that the consideration for the giving of the note had failed; that the note had been obtained by misrepresentation; that the plaintiff was not the holder of the note for value, but was a trustee thereof for W. H. Davis; that W. H. Davis had obtained the note wrongfully from the estate of his wife Hannah E. Davis; that, if the plaintiff acquired the note, he did so after maturity, and took it subject to equities or defects of title.

The facts in connection with the making of the note sued on (exhibit 1) are simple. Hannah E. Davis, wife of W. H. Davis, and the defendant, were sisters. By agreement in writing, dated the 2nd May, 1912, the defendant, for valuable consideration, agreed with her mother to pay her sister Hannah E. Davis the sum of \$300; and, pursuant to that agreement, on the 6th May, 1912, made and gave her promissory note for \$300 to Hannah E. Davis, payable at one month after date, at the Bank of Montreal, Picton. According to the defendant's evidence, at the time the note was given her sister, Hannah E. Davis, was on her

death-bed, and the note was given to recompense Hannah E. Davis for the maintenance of her mother, who, owing to the illness of Mrs. Davis, was being taken to the house of her other daughter, the defendant.

Within thirty days, and therefore before due date, the promissory note in some way passed into the hands of the Bank of Montreal at Picton.

On the day the note fell due, Hannah E. Davis died, leaving her surviving her husband, W. H. Davis, and an infant son, Carl Davis. It is not shewn whether or not she left a will, but it is shewn that no administration has been granted of her estate. Almost immediately after the death of his wife, W. H. Davis saw the defendant, and told her, according to her evidence, that the Bank of Montreal would sue her on her note which they held unless she paid or gave a renewal; and, as a consequence of this statement, on the 26th June, 1912, seventeen days after the due date of the note, W. H. Davis delivered to the defendant the note in favour of Hannah E. Davis (exhibit 6) duly endorsed by Hannah E. Davis, and in exchange therefor received the note sued on.

The note being overdue since September, 1912, the defendant paid in May, 1915, \$75 on account (see exhibit 4), and, according to the evidence, which is accepted by the Judge, the holder, Davis, agreed to wait for another year on being paid the \$75. Davis transferred the note to the plaintiff, on condition that he would wait for a year before collecting the same. This he did, and now, when he endeavours to collect, the defendant's real defence is, not that she does not owe the money, or that she did not get consideration for the original note, but that she owes the money to the estate of Hannah E. Davis, and that the title of W. H. Davis to the note (exhibit 6) was not such as to entitle him to give her a release or discharge from liability thereon.

The only evidence in support of this is to be found in the statement of Mr. Wilson, which by consent of counsel was filed as evidence, and which reads as follows: "Mr. A. E. Wilson, manager of the Bank of Montreal, Picton, testifies that the first \$300 note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. Hannah E. Davis unless otherwise instructed."

App. Div.
1917

ROBLIN
v.
VANALSTINE.
Ferguson, J.A.

App. Div.
1917
ROBLIN
v.
VANALSTINE.
Ferguson, J.A.

And there is a further statement in the defendant's evidence to the effect that, at the time of obtaining the note (exhibit 1), W. H. Davis threatened the defendant with suit on the first note through the Bank of Montreal, the inference being that the Bank of Montreal were then the holders.

It seems to me that these two statements, without more, do not displace the plaintiff's right to recover, in that they do not shew that W. H. Davis, at the time he delivered up exhibit 6, was not the holder thereof or not legally entitled to deliver it.

It is to be noticed that Mr. Wilson does not in his statement say: (1) that the bank received the note from Hannah E. Davis; (2) that they were trustees for Hannah E. Davis; (3) that Hannah E. Davis was the owner of the note; (4) that they would have had to receive instructions from Hannah E. Davis before crediting the proceeds of the note to any one other than Hannah E. Davis or delivering the note to any other person. These and the reason for the bank parting with the note to Davis are left to be inferred, not from a statement of facts, but from a statement of Mr. Wilson's conclusions of law and fact, on facts not stated.

To give effect to the defence, one must infer that W. H. Davis did not receive the note (exhibit 6) till after maturity, or, if before maturity, then only as messenger for his wife; that he had no right to deposit the note with the bank or instruct it, except as messenger; that the bank was a trustee not only of the proceeds but of the note itself exclusively for Hannah E. Davis; that the bank, in breach of trust, wrongfully delivered the note (exhibit 6) after maturity to W. H. Davis; and that W. H. Davis not only wrongfully received the note from the bank after maturity, but wrongfully converted it to his own use, and by false pretences obtained the note (exhibit 1) sued on from the defendant. The presumptions of law are all in favour of rightful acting and due observance of the law and against wrongdoing, and this is true even as to the conduct of a third party whose conduct comes into question collaterally: *Ross v. Hunter* (1790), 4 T.R. 33.

To my mind, there is not only reasonable doubt sufficient to prevent us drawing an inference of wrongdoing, but the surrounding facts and circumstances lead to a different result. At the time of receiving the note (exhibit 6), Hannah E. Davis was so ill that everything points to her inability to have herself taken

the note (exhibit 6) to the bank. Knowing she was about to die, she endorsed the note, and possibly, if not probably, gave it to her husband; the real consideration for the note being the maintenance and care in his house of his mother-in-law. Thus W. H. Davis was what possession of the note, endorsed in blank, made him appear to be, i.e., the owner of the note, and it is further possible that he deposited the note and instructed the bank, subject to his right to change these instructions. So far as the evidence shews, the defendant knew, when she signed exhibit 1, all she now knows; and, if she made a mistake or was misled, she took no steps to protect an innocent *bonâ fide* purchaser such as the plaintiff against the consequence of her act. On the contrary, she, nearly three years after making the note, paid \$75 on account, and obtained from W. H. Davis an extension of time for payment. Therefore, in my opinion, this is in any event a case where we should apply, in favour of the plaintiff, the familiar principle "that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it:" *Nash v. DeFrenille*, [1900] 2 Q.B. 72, at p. 83.

The evidence of Mr. Wilson and Mr. Davis may be obtained, and, to arrive at a satisfactory conclusion, should be had.

In my opinion, the onus was on the defence; and, if obliged to decide one way or the other on the evidence before us, I would dismiss the appeal; but, under the circumstances, I would give the defendant the right within ten days to elect to secure the evidence of Wilson and Davis or of either of them, and, on such election being made, would grant a new trial, making the costs of the former trial and of the appeal costs in the cause to the successful party. I would direct that the Official Guardian be notified of the proceedings, so that he may, if he sees fit, attend the trial to guard the rights of the infant Carl Davis—the Guardian's costs also to be in the cause. In default of election, I would dismiss the appeal with costs.

Appeal allowed; MAGEE and FERGUSON, JJ.A., dissenting.

App. Div.
1917

ROBLIN
v.
VANALSTINE.
Ferguson, J.A.

1917

[APPELLATE DIVISION.]

June 12.

D. v. B.

Trial—Action for Breach of Promise of Marriage—Jury—Prejudice to Defendant—Evidence as to Origin—Alien Enemy—Address of Counsel for Plaintiff to Jury—Evidence of Accusations Made by Relatives of Defendant against Plaintiff—Evidence of Attempt of Relatives to Deport Plaintiff—Improper Admission of—Excessive Damages—Failure of Trial Judge to Caution Jury—Substantial Wrong—Judicature Act, sec. 28—New Trial—Objections not Made at Trial.

The plaintiff in an action for breach of promise of marriage was a Russian Jewess, who had recently come to Ontario; the defendant was born in Galicia, Austria, was educated in Ontario, and was a member of the Bar of Ontario. A verdict for the plaintiff for \$5,000 damages was set aside and a new trial directed (MAGEE and HODGINS, JJ.A., dissenting), on the grounds: (1) that the defendant was prejudiced before the jury by the fact as to his place of birth being brought out in evidence and his enemy origin contrasted with that of the plaintiff, a citizen of a friendly country, and by counsel for the plaintiff alluding thereto in his address to the jury; (2) that, while it was not improper to give evidence of what passed between the defendant and the plaintiff with reference to accusations which the relatives of the defendant were said to have made against the plaintiff, it was improper to admit evidence that these statements had in fact been made; (3) that evidence of a complaint made by a relative of the defendant to an Immigration officer, with a view to having the plaintiff deported, was improperly admitted; (4) that the damages were excessive, and it was not unreasonable to conclude that they were aggravated by the introduction of evidence which should not have been admitted; and (5) that the trial Judge had not warned the jury against allowing their conclusions to be affected by the fact, if they found it to be a fact, that the defendant's relatives had made untrue accusations against the plaintiff or had sought to have her deported, nor had he cautioned the jury against being affected one way or the other by the evidence that had been admitted as to the racial origins of the parties.

There had been substantial wrong to the defendant, within the meaning of sec. 28 of the Judicature Act; and he should not be denied a new trial because his counsel failed to object at the trial to the evidence and acts complained of upon appeal.

AN appeal by the defendant from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, in favour of the plaintiff, in an action for breach of promise of marriage, for the recovery of \$5,000 damages and costs.

The plaintiff was a Russian Jewess, 19 years of age; the defendant was born in Galicia, Austria, was educated in Canada, and was a practising barrister and solicitor in the city of Toronto, where he met the plaintiff.

The grounds of appeal were: (1) the improper admission of evidence; (2) improper conduct by the plaintiff and her counsel in using such evidence to influence the minds of the jurors; (3) nondirection; (4) excessive damages.

March 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., for the defendant, argued that the damages awarded were excessive, and that matters improper for their consideration had been presented to the jury. The address of the plaintiff's counsel was inflammatory and calculated to arouse an unfair prejudice against the defendant, as being an alien enemy. [MEREDITH, C.J.O., referred to *Gage v. Reid* (1917), 38 O.L.R. 514, 34 D.L.R. 46.] I rely on that case, although of course the circumstances are different. It is not difficult to inflame the minds of jurymen against an alien enemy; and that is what was done in this case. Evidence was admitted as to scandalous remarks made by the defendant's relatives regarding the plaintiff, but there is no evidence that the defendant himself spread such reports. The defendant was entitled to have the case fairly tried, without any reference to creed or nationality. The amount awarded by the jury for damages is out of all proportion to the circumstances of the parties. [MEREDITH, C.J.O., referred to *Slazengers Limited v. C. Gibbs and Co.* (1916), 33 Times L.R. 35.] Reference was made to *Woodman v. Blair* (1879), 30 U.C.C.P. 452. A verdict for \$500 or \$1,000 might be accepted, but a judgment for \$5,000 was a terrible weight for a young and struggling lawyer to carry.

Peter White, K.C., and *J. J. Gray*, for the plaintiff, the respondent, argued that the whole conduct of the defendant had been such as to justify the award of damages made by the jury. He had allowed the injurious statements made by his relatives to influence him unduly. No objection had been made to the evidence of these statements, and it was proper to shew that the defendant had allowed them to be made and had repeated them to the plaintiff. The learned trial Judge had said nothing by way of comment on the address of the plaintiff's counsel, which shews that nothing improper was said. The reasons adduced in favour of a reduction of damages are flimsy, and no error of principle is shewn such as would justify a reduction: *Sornberger v. Canadian Pacific R.W. Co.* (1897), 24 A.R. 263. Reference was also made to *McDonald v. Murray* (1884), 5 O.R. 559, 575; *Bradlaugh v. Edwards* (1861), 11 C.B.N.S. 377, per Erle, C.J., at p. 383; *Dale v. Toronto R.W. Co.* (1915), 34 O.L.R. 104; *Campbell v. Beamish* (1852), 8 U.C.R. 526.

App. Div.
1917

D.
v.
B.

App. Div.

1917

D.

v.

B

Hellmuth, in reply, argued that a deliberate attempt had been made to lead the jury to consider matters which they should not consider. On the question of damages he referred to Halsbury's Laws of England, vol. 16, p. 277.

June 12. FERGUSON, J.A.:—This is an action for breach of promise of marriage, and the appeal is by the defendant from a judgment for \$5,000 and costs pronounced by Mr. Justice Latchford, on the verdict of the jury, after the trial at Toronto jury sittings on the 15th, 16th, and 17th January, 1917.

The respondent, a Russian Jewess, now 19 years of age, was by her parents sent from her home in the city of Baronovichi, Russia, to study in Jerusalem, and was there at the time of the outbreak of war; from there she was driven by the Turks, and, in consequence, travelled to Egypt, to New York, and later to Toronto, where she arrived in August, 1915, becoming employed here as a teacher in the Jewish kindergarten.

The appellant was born in Galicia, Austria, was educated in Toronto, and is a member of the legal profession, having been admitted to practice about two years ago, and is now employed by one of the legal firms of this city on a salary of \$1,500 a year, and is without other means.

The evidence shews that his people are poor, that he contributes to their support, and that it was largely owing to their objections that his promise to marry was not fulfilled.

The respondent did not prove actual damage, and the verdict of \$5,000 is almost entirely sentimental.

The grounds of appeal are: improper admission of evidence; improper conduct by the plaintiff and her counsel in using such evidence to influence the minds of the jury; nondirection; and that the damages, considering the station in life of the parties and the financial position and prospects of the appellant, are excessive.

The appellant's counsel argues that the damages were largely increased because the respondent and her counsel improperly placed before the jury a number of matters not in issue between the parties, and that the jury in fixing the damages were influenced and prejudiced by this improper evidence, and an inflammatory address thereon.

The matters complained of are:—

First, that the fact that the appellant was of *Austrian* birth was contrasted with the plaintiff's *Russian* nationality, and made use of to prejudice the appellant. In the present state of public opinion, this was calculated to, and probably did, have the effect claimed.

The matter is twice referred to in the evidence: first, in the respondent's testimony, at p. 14; secondly, in the examination of the appellant's witness Rabbi Jacobs, at p. 131.

While the respondent's counsel is not responsible for the last reference, he is, in my opinion, responsible for the first. The appellant's counsel, speaking from his instructions, asserted, and the respondent's counsel did not deny, that the respondent's counsel in his address to the jury referred to the nationality of both parties. This could only have been for the purpose of prejudicing the jury.

The effect, in the present state of public feeling, of calling a party a "German" or an "Austrian" is dealt with in two very recent cases; one in the English Courts and the other in our own Courts. In *Slazengers Limited v. C. Gibbs and Co.*, 33 Times L.R. 35, the claim was for defamation by calling the plaintiffs "a German firm." Counsel for the defence contended that to call a firm German was not defamatory, because the words must be taken in their ordinary sense, and, so used, did not hold a person up to hatred and contempt, to which Mr. Justice Astbury replied: "A defamatory statement depends on time and circumstance. I agree that there were times in this country when it was not defamatory to call a person a *German*"—and decided that the claim was well-founded. In our own Courts, in the recent case of *Gage v. Reid*, 38 O.L.R. 514, 34 D.L.R. 46, the second Divisional Court ordered a new trial because, among other things, it was given in evidence that the plaintiff was an *Austrian*, and counsel for the defence was permitted to urge the jury to assess the plaintiff's damages because of his nationality at little or nothing.

In the case at bar, the plaintiff's counsel should not in his address have made use of the defendant's Austrian origin as he did.

The second matter that the appellant complains of as having been improperly admitted in evidence and presented for consideration to the jury was, that the appellant's near relatives insulted, slandered, and otherwise persecuted the respondent.

There is no doubt that this kind of evidence was admitted.

App. Div.

1917

D.

v.

B.

Ferguson, J.A..

App. Div.
1917

D.

v.

B.

Ferguson, J.A.

I do not propose to quote all the evidence in reference thereto, but it is found in many places throughout the evidence.

As examples, I quote from pp. 17, 18, and 128. On p. 17 the plaintiff is asked by her counsel as follows:—

“Q. Mr. B. asked you for the marriage license?” After making a long answer covering 11 typewritten lines, she winds up the answer with this addition: “After the scandal that his sisters make in my house, I called up Mr. B. to the office, I asked him, ‘What is that your sister is coming to my house to make scandal, to persecute me? What is it that your people are coming to my house to make scandal and persecute me?’ A. He answered me, ‘Don’t pay attention and it will be all over.’ I explained to him that this persecution and scandal is not for me to have it.

“Q. You were not deserving? A. Yes. I don’t want to hear such word in my house, that people should come and call me such shameful names. He promised me by the best he will come over to see me; he will speak to me.”

On p. 18, in answer to her counsel:—

“Q. Did he say anything about the letter? A. Yes, he said he received my letter. Then when he came to me I explained to him my position, and how I feel everything, and his parents is persecuting me all over the city.

“Q. You tried to explain your position to him? A. Yes.

“Q. And that his parents had persecuted you all over the city? A. Yes.”

On p. 128 (cross-examination of the defendant):—

“Q. Hadn’t Miss D. told you time and time again what your people said to her in her presence, your sister Bessie, and your sister Mrs. Fauman, and Fauman? A. My sister Bessie saw her once; my sister Mrs. Fauman never saw her, and the doctor saw her either once or twice.

“Q. Miss D. told you Mrs. Fauman had insulted her over the telephone then? A. No, she said my sister Bessie had spoken to her, and Dr. Fauman.

“Q. And had come running up to her room? A. Had caused some scandal or other, she said, in her home.”

It was stated in evidence, and no doubt in the address to the jury, that the aim and object of the respondent in prosecuting this action was to clear her name and character from the imputa-

tions and scandals not of the appellant, but of his mother, his sisters, and his brother-in-law. To illustrate, I quote a question by the respondent's counsel and the appellant's answer, at p. 127: "Q. And she (the plaintiff) told you she never would have brought action if your people had not cast these scandals broadcast about her? A. She told me that, yes."

Also three questions put in cross-examination to Rabbi Jacobs, at p. 143:—

"Q. The trouble was that these things had been said against her; that was her trouble, wasn't it? A. I don't know.

"Q. Didn't she tell you so? A. She told me so.

"Q. She gave that as the reason for not being willing to settle for a million dollars, didn't she? A. Yes."

The slanders or some of them were most defamatory, and would probably be taken into consideration by the jury.

A perusal of the evidence shews that much of the time occupied by the trial was thus taken up in putting before the jury the wrongdoings of the defendant's relations, including their efforts to induce the Immigration authorities to take proceedings to deport the respondent as an undesirable immigrant.

This matter is first referred to in the plaintiff's testimony in chief, at p. 38, but is gone into more fully in the evidence of the Immigration officer at p. 81:—

"*Mr. White:* Q. You are connected, I understand, with the Immigration Department? A. Yes.

"Q. That is the Canadian Immigration Department? A. Toronto, Dominion Immigration office.

"Q. Did you have some complaint in regard to the plaintiff, Miss D.? A. I received certain information about the plaintiff.

"Q. From whom? A. I am not at liberty to divulge that, on account of departmental regulations.

"THE COURT: Q. They cannot be invoked here. Was it from the defendant? A. No.

"*Mr. White:* Q. Directly or indirectly? A. It was from a relation of his.

"Q. What happened? The name is not material? A. Certain information was given to me that the plaintiff had become a public charge.

"Q. Living on charity? A. Yes.

App. Div.
1917

D.
v.
B.

Ferguson, J.A.

App. Div.
1917

D.

v.

B.

Ferguson, J.A.

"Q. And was therefore subject to deportation? A. Yes. I went and called on the plaintiff and examined her.

"Q. That was the information that came to you, and, as a result of that, you called on the plaintiff and examined her? A. Yes."

Cross-examined by *Mr. Phelan*:—

"Q. That did not come from the defendant? A. No.

"THE COURT: A relative of the defendant's.

"*Mr. Phelan*: My Lord, a man cannot be responsible for all his relatives.

"THE COURT: Perhaps not. *Mr. White* did not press the matter, or the witness would have had to answer."

No attempt was made before us to justify the admission of this evidence, and, in my opinion, it was improperly admitted.

The respondent is represented to us as being well educated and highly accomplished. Her evidence shews her to be clever and artful. She missed no opportunity of making long self-serving statements, holding herself up to the jury as being slandered, insulted, and persecuted by the appellant's relatives. The respondent's counsel repeated these statements and cross-examined in reference thereto. See the following questions and answers in the defendant's cross-examination (p. 116):—

"*Mr. White*: Q. Did she tell you that your sister had come to the house, walked in the door without knocking, had gone up to her room, and had there told her to her face that she was a prostitute? A. No, she told me my sister came up there and made a scandal. She did not say what took place.

"Q. And that *Dr. Fauman* (brother-in-law) and his wife had also come in, and made the same statements in the *Steinburg* house? A. No, they weren't there, except *Dr. Fauman*.

"Q. Did *Miss D.* say that to you? A. She told me *Dr. Fauman* was there.

"Q. And you know that the statement of your sister was not true, don't you? A. That is right.

"Q. What did you do about it? A. I told her—

"Q. Are you going to allow your sister to make statements of that kind about the girl you love? A. I merely told her she shouldn't interfere."

This and similar passages in the evidence lead me to think that there was a deliberate attempt on the part of the respondent and

her counsel to prejudice the jury with evidence and suggestions of misconduct by the appellant's relatives.

The third line of evidence objected to by the appellant's counsel is best illustrated by quoting a question and answer from the evidence of the respondent's witness Miss Levinsky, at p. 75:—

“*Mr. White: Q. Are you able to tell us the effect on a girl's life among the Jewish community here in the city when a man refuses to marry her after being engaged to her? A. It is very humiliating to the girl, and, of course, it gives rise to a question of doubt as to her morality, because when a man refuses to marry a girl, after taking out a marriage license, if another young man would desire to marry that girl, the mother of that young man would say, ‘Well, so and so didn't want to marry her after he took out a marriage license. What is the matter with the girl?’ It is very, very humiliating, and puts the girl in a very questionable position.*”

The contract, and the rights of the parties thereunder and their remedies for a breach thereof, are governed by the laws of this Province; and, on a breach of such a contract, there is here no such inference of law affecting the respondent's morals as is stated in the foregoing answer. If the evidence was tendered and received to express the proper inference of fact, then I think that was an inference to be drawn by the jury and not by the witness. The jury were not instructed to the contrary, and they may have been greatly impressed and misled by this line of evidence.

The principles of law and rules governing the trial of an action for breach of promise are considered in *Smith v. Woodfine* (1857), 1 C.B.N.S. 660. In that case Mr. Justice Willes, at p. 667, quotes with approval from the American work, Sedgwick on Damages, 2nd ed., p. 368, as follows: “The action for breach of promise of marriage . . . though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has always been held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage . . . From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damage is a question for the sound

App. Div.
1917

D.
v. B.

Ferguson, J.A.

App. Div.
1917

D.

v.

B.

Ferguson, J.A.

discretion of the jury in each particular instance . . . —subject, of course, to the general restriction that a verdict influenced by *prejudice*, *passion*, or corruption, will not be allowed to stand. Beyond this the power of the Court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages.”

This case is referred to and quoted with approval in a number of later cases, and is so cited in Halsbury, vol. 16, p. 277, para. 508. The American authorities to the same effect are collected in 5 Cyc., p. 1014 *et seq.*

No authority to justify the admission of evidence in aggravation of damages of the slanderous statements or of the misconduct of third parties was cited to us, and I was unable to find any, and I cannot think that there is any principle or rule of evidence that justifies putting before the jury evidence of the feelings, statements, and actions of third parties against the plaintiff, particularly when it is sought thereby to increase the amount of damages that the defendant may have to pay; therefore, I am of the opinion that much evidence tending to prejudice the appellant was improperly presented to and considered by the jury.

Counsel for the defence argued before us that the matters now complained of by the appellant were not important and did not affect the verdict, and that this is shewn by the fact that the trial Judge gave no directions in reference thereto. Nondirection in this and other respects is, I think, accounted for by the fact that the minds of the trial Judge and of the counsel were directed to considering only one of the questions that arose at the trial, viz., Was or was there not a breach of contract?

Before counsel commenced to address the jury, the learned trial Judge asked the jury to retire, and then, addressing counsel, made this statement:—

“I may say, gentlemen, that in asking the jury to retire, it was with a view of expressing my desire that counsel should confine their addresses to what appears to me to be the only point in the case. It is undeniable that there was a promise to marry. Now, the contention of the defendant is that there was a new arrangement, and that if that was broken, as it was broken apparently, it was the fault of the plaintiff. Is there anything else in the case? Then the question of damages? Can you suggest that there is

anything else to which counsel should address themselves before the jury.

"*Mr. White*: That is the case as I have it in my own mind"

"*Mr. Phelan*: That is all I see.

"THE COURT: Counsel will confine themselves to that brief point."

App. Div.
1917

D.
v.
B.

Ferguson, J.A.

The result was that the Court did not direct the jury on what evidence they were to consider or not to consider in connection with the assessment of damages. So that we must, I think, conclude that the jury, when they came to assess damages, took into consideration all this evidence, which, as it appears to me, was improperly admitted, to the prejudice of the appellant. Section 28 of the Judicature Act, R.S.O. 1914, ch. 56, provides that a new trial shall not be granted on the ground of misdirection or improper admission of evidence, etc., unless some substantial wrong has been thereby occasioned. In arriving at a conclusion on this question raised by the Judicature Act, I think we must consider the amount of the verdict, having regard to the financial and social position of the parties.

The respondent is a young woman; Canada is not her home or the home of her parents. She is in this country not by choice but by force of circumstances. She had been here less than a year when this action was commenced. She will probably return to her own country and her own people at the first opportunity. There her prospects of future marriage will not probably be affected by the appellant's action.

The defendant is a young man who was educated through the efforts and self-denial of his parents and sister. They are poor; they have claims upon the appellant. And, while not legally, he is morally, bound to recognise these claims, as the evidence shews he has been doing. After he maintains himself and contributes to the support of his immediate family, very little, if anything, can be left out of his present income to be applied toward a liquidation of a verdict of \$5,000 and costs.

In my opinion, the verdict is, under all the circumstances, excessive, and was materially increased by the wrongful acts and improper evidence complained of, and therefore substantial wrong, within the meaning of sec. 28 of the Judicature Act, has been done. See *Gage v. Reid*, 38 O.L.R. at p. 523. Having arrived at the

App. Div.
1917

D.
v.
B.

Ferguson, J.A.

conclusion that substantial wrong has been done, I cannot think that we must deny the appellant a new trial simply because his counsel failed at the trial to object to the evidence and acts now complained of. In this, I think, I am supported by the opinion of the Court in *Gage v. Reid*, *supra*, at p. 521.

For these reasons, I would set aside the judgment in the Court below and direct a new trial, the costs of the former trial and of this appeal to be costs in the cause to the appellant in any event.

MEREDITH, C.J.O.:—I have had the opportunity of reading the opinions of my brother Hodgins and my brother Ferguson, and, while not subscribing to all that the latter says, I agree with him that it is proper that there should be a new trial.

I cannot agree with my brother Hodgins that counsel for the appellant at the trial was responsible for the introduction of the question of the racial origin of the appellant. I cannot believe that, in the light of the happenings of the last three years, any juryman would not know that Lemberg was in Austria or at least in an enemy country, though I agree that it is more than probable that he would not know the whereabouts of Kolbuszowa. Nor can I agree that the fact that the appellant was of Austrian origin would not, in the present state of public opinion, militate against him. Why were the questions asked if it were not to help the respondent or to hurt the appellant? For what other purpose was it deemed important for the respondent to establish "these interesting geographical facts," as my brother Hodgins describes them? The prejudice to the appellant was, I think, greatly aggravated by the contrast between the parties, evidently sought to be impressed upon the jury by painting the respondent as a refugee from our ally Russia, while the appellant was of Austrian enemy origin.

I agree with my brother Hodgins that it was not improper to give evidence of what passed between the appellant and the respondent with reference to the accusations which the relatives of the appellant were said to have made against her; but it was, in my opinion, improper to permit evidence that these statements had in fact been made. It was but human nature for the jury, if they believed that they had been made, to take that into account in assessing the damages which the appellant ought, in their opinion, to pay.

The evidence as to the complaint that was made to the Immigration officer was allowed to go too far. While it would have been quite proper to have endeavoured to connect the appellant with it, it was not proper to shew that the complaint was made by a relative of the appellant.

The damages, too, are excessive. If that were the only ground of complaint, it is probable that the verdict ought not to be disturbed; but, in view of the very large damages awarded, it is not unreasonable, I think, to conclude that they were aggravated by the introduction of the evidence which I have said ought not to have been admitted.

Nothing was said in the charge of the learned Judge by way of warning to the jury against allowing their conclusions to be affected by the fact, if they found it to be a fact, that the appellant's relatives had made untrue accusations against the respondent or had sought to have her deported; nor were the jury cautioned against being affected one way or the other by the evidence that had been admitted as to the racial origins of the parties.

I am always reluctant to interfere with the finding of a jury, and endeavour to be on my guard against usurping the functions of a jury in a case in which they have come to a conclusion different from that which I have formed as to the result of the evidence; but, at a time like this, when the minds of the people are rightly inflamed against the German and Austrian peoples, it is, I think, incumbent on the Court to guard against that feeling being used to the detriment of a litigant who comes or is brought into a Court of Justice, and to be astute to see that, where it has been played upon by the successful litigant, he is deprived of any advantage thus unfairly obtained; and it is not, I think, unfair to presume against such a litigant that his effort has had the desired effect.

MACLAREN, J.A., agreed with the Chief Justice.

HODGINS, J.A.:—I find no trace in the charge of the learned trial Judge of any suggestion, even a remote one, that counsel for the defendant had exceeded his privilege in addressing the jury or had uttered improper or inflammatory remarks. As counsel for the appellant, who addressed us, was not at the trial, and counsel for the respondent declined to be drawn into making a statement,

App. Div.

1917

D.

v.

B.

Meredith, C.J.O.

App. Div.
1917

D.
v.
B.

Hodgins, J.A.

the Court has nothing before it which would warrant it in drawing a conclusion that this case is in any way similar to that of *Gage v. Reid*, 38 O.L.R. 514, 34 D.L.R. 46. It was in fact an essentially different case, both in the proof and in the appeal to the jury.

Under these circumstances, I think the Court should not make an assumption at the expense of counsel and of the learned trial Judge, who, I have no doubt, would not have permitted anything unfair to the appellant to take place before him in open Court. Even if counsel erred in the direction indicated, there is a very salutary rule laid down that the attention of the presiding Judge shall be called to the matter on the spot.

Boyd, C., in *Sornberger v. Canadian Pacific R.W. Co.*, 24 A.R. 263, thus defines it (p. 272): "Then the defendants moved for a new trial on the ground of the license of speech on the part of the plaintiffs' counsel in his address to the jury, inasmuch as he went into irrelevant matter which would tend to warp their judgment and aggravate the damages. But no objection was lodged at the time by the defendants—no appeal was made to the presiding Judge, who was there for the very purpose of seeing that the trial was duly and properly conducted, and whose intervention should have been claimed while the alleged transgression was being committed. It is a practice not to be encouraged to allow matters eminently proper to be disposed of by the Judge to be passed over *sub silentio* before him, and then made subjects of complaint in an appellate forum: *McDonald v. Murray*, 5 O.R. 559, at pp. 575 and 582. He, present, hearing and seeing, can best rule as to whether there has been an undue invasion of the large privileges of counsel addressing the jury; and if the best and most immediate remedy of closure or the like is not invoked before him, it must be taken that the gravity of the situation was not so serious at the time of the address as it afterwards looms up in the light of the verdict."

This is referred to with approval by the Appellate Division in *Dale v. Toronto R.W. Co.*, 34 O.L.R. 104, 109, 24 D.L.R. 413, and is apparently the rule in this Province—save in exceptional cases, of which this is not one. Here no protest was made, and, in consequence, the objection urged is not open to the appellant.

The verdict is large, and, to my mind, much too large, considering the station in life of the parties and the immediate pros-

pects of the appellant; and, in view of that fact, it is important to consider very carefully the grounds raised involving the admission of improper evidence which, it is said, prejudiced the appellant, and may have resulted in increasing the verdict.

As to the racial origin of the appellant, I think the Court is relieved from considering its effect upon the jury, as the information as to it was supplied by the appellant's own counsel. I have not yet made the acquaintance of any case in which a party has succeeded in getting a new trial because his counsel, either inadvertently or of set purpose, stated a fact which is afterwards said to re-act unfavourably upon his client. It may be that counsel for the respondent was intending to prove the fact that the defendant was of Austrian origin, but he was stopped before he elicited anything more than the fact that Kolbuszowa was in Galicia and that the respondent did not know how far it was from Lemberg. These interesting geographical facts could do no possible harm to the appellant, unless the jury were thoroughly well-informed as to the various races who inhabit the locality in question, and were able to determine that in the particular place mentioned, at some unknown distance from Lemberg, no one but Austrians were found. I have not found any authority for the argument that the nationality of the respondent and her wandering life and friendless condition here, in fact her individual history and position, facts originally quite proper evidence, became inadmissible because afterwards it appears that the appellant was born in Austria. Even if the fact that the respondent was a Russian made it, if improper, a matter of greater prejudice to describe the appellant as of Austrian origin, I am still of the opinion that the additional burden cannot be shifted from the appellant's own shoulders any more than the original responsibility for its introduction. I am not sure that the infamous character displayed by the Germans has in the public mind attached itself to the Austrians as a universal attribute. The argument, however, assumes this. Nor am I prepared to assent to the more general proposition that, in an action such as this, race and racial characteristics are not admissible as part of the character and personality of the parties, if they happen to be, at the same time, eminently undesirable as national attributes.

As the second point urged—namely, that evidence was given that members of the appellant's family had uttered slanders upon

App. Div.
1917

D.
v.
B.

Hodgins, J.A.

App. Div.
1917

D.

v.

B.

Hodgins, J.A.

the respondent, for which the verdict shews the appellant was held responsible—this is hardly stating the position fairly.

So far as I can see from the respondent's evidence, the scandals which the family of the appellant are said to have given circulation to, were first mentioned by the appellant at Mrs. Steinburg's; he indicating that they were told to him when he announced his intention of marrying the respondent. The appellant himself suggested that she should speak to his sister, and the respondent did so, meeting, she says, with insult and shameful language. The details of this language were properly ruled out by the learned trial Judge. But the fact of these scandals being in the air continued to be a subject of discussion between the two, and the respondent resented them and continually complained to him about them, he trying to smooth matters over and promising marriage at a later date. At the same time there is no doubt, if the respondent is believed, that the appellant himself repeated these scandals to the respondent and asked for an explanation, as he had a right to do, and she refused to answer. The young lady, by taking this course, led the appellant into the mistake of thinking he might use this refusal as a ground of defence, as was done in *Baddeley v. Mortlock* (1816), Holt N.P. 151. The case just mentioned is approved in *Jefferson v. Paskell*, [1916] 1 K.B. 57, 68.

The bearing of this phase of the case, from the respondent's standpoint, is this: The appellant, being aware of these statements by his family, repeated them to the respondent, and created an unhappy state of affairs which he took advantage of to secure a postponement for a year. Then he made use of them again to repudiate his promise altogether.

On p. 31, again, this is said: "I can't marry you now, because the people knows all in the city about scandals and about everything. I don't want to marry you. . . . When I like you, I went and took marriage license. Now I don't like you, and I don't want to keep my promise."

This, of course, is the respondent's story, and is denied generally by the appellant. But the question just now is not whether it is true, but whether it contains anything inadmissible.

If the fact that the appellant's family had made statements about the plaintiff which he carried to her and demanded an ex-

planation, resulting in heart-burning, and finally—if one may judge from the statement of defence, as one has a right to do, as paragraphs 3 and 4 were persisted in down to the day of trial—in his declining to marry her, I am quite unable to see how that evidence can be shut out.

And, if this be competent evidence, it surely cannot be improper, but rather quite common sense, to indicate the source of these reports in order to shew that they really had been circulated and were not merely imaginary grievances or irresponsible gossip.

Nothing more was done, so far as I can see after reading the evidence with care, than was necessary to shew that these statements by the family, repeated by the appellant, caused great friction and strain, and were used as an excuse first for postponement, and then for repudiation. The striking out of the paragraphs in the defence which set up this justification for this breach prevented the appellant from relying at the trial on misrepresentation or reports of improper conduct, but did not prevent the respondent from shewing that he had done so until he came to Court. This is good cause for increased damages. The whole of the circumstances under which the breach took place are proper for the jury on the question of damages.

Lord Esher in *Finlay v. Chirney* (1888), 20 Q.B.D. 494, at p. 498, says: "Not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behaviour; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise."

If the appellant here repeated statements which he said were based on family conversation, he cannot object to that fact coming out in evidence if his repetition of them forms an element in the unhappy state of affairs resulting.

As to the next ground, namely, that evidence was improperly admitted, seeking to connect the appellant with the action of the Immigration authorities, I think an answer to that is found in the record of what took place at the trial. The respondent's counsel evidently hoped to bring this home to the appellant.

App. Div.
1917

D.
v.
B.

Hodgins, J.A.

App. Div.
1917

D.

v.

B.

Hodgins, J.A.

I cannot see why failure in the attempt to connect him with whatever action was taken, caused any serious wrong or prejudice to the appellant. The incident did not impress the learned trial Judge as in any way important. It dropped with the remark from him that Mr. White did not press the matter.

Further objection was made that it was wrong for the respondent's counsel to suggest that what occurred was humiliating to a girl in the Jewish community, and would give rise to doubt as to her morality. I fail to appreciate the objection, as it has been laid down over and over again that the effect on a girl's prospects and happy settlement may be considered, and that the jury are entitled to give sentimental damages. The fact, if proven, would form a proper foundation for them. It was, however, controverted, and the jury were entitled to consider it in the light of both the assertion and its denial.

It was not argued that the verdict was increased by evidence that the respondent had suffered special damage, having lost, through the action of the appellant, or given up in consequence of his promise, her position as kindergarten teacher. I do not find the matter mentioned in the charge, and, as nothing was said about it on the argument, its effect may be disregarded. See *Quirk v. Thomas*, [1916] 1 K.B. 516.

I cannot help thinking that undue emphasis has been placed on the events of a rather commonplace trial, because, unless some prejudice or undue motive can be shewn, it is a matter of great difficulty for the Court to interfere in a case of this nature.

In the case of *Berry v. Da Costa* (1866), L.R. 1 C.P. 331, Willes, J., where the damages were £2,500, says in regard to them (p. 334): "The Court is called upon to exercise an exceedingly nice jurisdiction, and to interfere with that which is the peculiar and exclusive province of the jury so long as they are not misled by prejudice or gross mistake, or misconduct themselves." And he quotes with approval *Smith v. Woodfine*, 1 C.B. N.S. 660, where the Court laid it down that it would not interfere with the discretion of the jury in a breach of promise case as to the amount of damages, unless there had been some obvious error or misconception on their part, or it was made apparent that they had been actuated by undue motives. Willes, J., in that case, had himself declined to interfere, because, as he said, he was unable to satisfy

his mind that the jury had either been misled or had acted from bad or corrupt motives.

In the first-mentioned case Montague Smith, J., says (L.R. 1 C.P. at pp. 335, 336): "It is peculiarly the province of the jury to say from all the surrounding circumstances what compensation the injured party is to receive. It is quite impossible to analyse the elements of their verdict. The jury are clearly entitled to take into their consideration the wounded feelings and the altered social position of the plaintiff, and also the condition in life of the defendant."

That was a case in which all the Judges thought the damages were too large. In *Woodman v. Blair*, 30 U.C.C.P. 452, that decision was followed, although the Court thought the damages, \$4,500, unusually large.

Swinfen Eady, L.J., in *Quirk v. Thomas*, [1916] 1 K.B. at p. 527, says, in considering what the damages in an action such as this could be: "In such an action the injury is treated as a personal one, and damages are awarded in respect of the personal injury to the plaintiff occasioned by the personal conduct of the defendant; the conduct of both parties may be taken into account in assessing damages, and circumstances of mitigation or aggravation may be given in evidence; monetary expenditure or giving up a post or change of position in reliance on the promise may certainly be given in evidence as aggravating circumstances; and damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner; the damages are entirely at large, and, whatever matters are taken into account, the damages awarded are one lump sum."

In Halsbury's Laws of England, vol. 16, p. 277, para. 510, the tests given are misconception and improper motives.

I had thought that perhaps the jury's discretion could be limited in some way by the evidence of the means of the appellant, where that evidence is uncontradicted. But, after all, that class of evidence is merely to enhance (or mitigate) damages, and is so admitted (Bowen L.J., in *Finlay v. Chirney* (*ante*)).

If I had been able to bring this case within the exception to the rule laid down in *Praed v. Graham* (1889), 24 Q.B.D. 53, as stated by Vaughan Williams, L.J., in *Johnston v. Great Western*

App. Div.
1917

D.
v. B.

Hodgins, J.A.

App. Div.

1917

D.

v.

B.

Hodgins, J.A.

R.W. Co., [1904] 2 K.B. 250, at p. 257, i.e., if the jury had taken into account some head or measure of damage not properly involved in or applied to the claim, I would have been in favour of setting aside the verdict as excessive.

But that is not shewn, and it is exceedingly difficult to shew it except where the damages are obviously based on some discernible calculation. There are in this case statements, said to have been made by the appellant to his *fiancée*, which I should have liked to have seen specifically denied. The jury, in the absence of explanation, might well take them into account in fixing the damages.

On the whole, I am reluctantly of the opinion that the judgment appealed against should stand, and that the appeal should be dismissed with costs.

MAGEE, J.A., agreed with HODGINS, J.A.

New trial ordered; MAGEE and HODGINS, JJ.A., dissenting.

1917

[APPELLATE DIVISION.]

June 12.

RE COLEMAN AND TORONTO AND NIAGARA POWER CO.

Easement—Expropriation by Power Company—Compensation to Land-owner—Award—Notice of Expropriation—Acquisition of Larger Powers than actually Used—Damage or Depreciation from Possession and Potential Use—2 Edw. VII. (D.) ch. 107, secs. 12, 21—Railway Act of Canada, 1888, sec. 146—Power of Company to Bind itself not to Exercise Powers Vested in it—Reference back to Arbitrators—Costs.

Upon an appeal from an award fixing the amount of compensation to be paid to a land-owner in respect of an easement expropriated by the company under the powers conferred by the Dominion statute incorporating it, 2 Edw. VII. ch. 107, sec. 21 (c.), it was decided that the land-owner was entitled to be paid, not only for the damage caused to him by what had been done, but for all the damage that was caused to him by the power given to the company, whether it had in fact exercised it or not, provided the company's notice covered the user of it; and an order referring the matter back to the arbitrators was made.

Pursuant to this order, the majority of the arbitrators made an award for a small sum; and it was *held*, upon appeal, that what was really in issue was the damage or depreciation caused by reason of the possession and potential use by the company of its unused powers—what was to be valued was the property in the owner's hands, subject to the restrictions or easements by which it was affected, though their discharge or the unlikelihood of their use or enforcement must be considered in ease of the loss.

Held, also, that it was beyond the power of the company to enter into an agreement to limit the easement to that actually in use.

Sections 12 and 21 of the incorporating Act, 2 Edw. VII. ch. 107, and sec. 146 of the Railway Act, 51 Vict. ch. 29, considered.

Ayr Harbour Trustees v. Oswald (1883), 8 App. Cas. 623, followed.

Stourcliffe Estates Co. Limited v. Bournemouth Corporation, [1910] 2 Ch. 12, distinguished.

Held, also, that the award could not be interfered with on the ground that the arbitrators had no right to deal with the costs of the former arbitration: the statute where applicable must govern.

The award was set aside, and the matter again referred back to be considered by the arbitrators.

1917
RE
COLEMAN
AND
TORONTO
AND
NIAGARA
POWER CO. ✓

APPEAL by A. B. Coleman, land-owner, from a majority award of \$2,500, being an increase of \$137.50 over a former award, the matter in question being the compensation to be paid to the appellant by the company in respect of an easement expropriated by the company under the powers conferred by a Dominion statute incorporating it: 2 Edw. VII. ch. 107, sec. 21 (c.)

March 21 and 22. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., for the appellant, referred to *Gibb v. The King* (1915), 52 S.C.R. 402, 27 D.L.R. 262, and to *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623, which is an authority for the proposition that where the Legislature confers powers for compulsory purchase of land, it is on the ground that such powers are for the public good, and a contract not to use such powers will be void. In making their award, the majority of the arbitrators had fallen into error in refusing to recognise the principle of this case. The arbitrators had no right to deal with the costs of the former arbitration.

D. L. McCarthy, K.C., for the respondent company, argued that the Court was bound by the decision of the Privy Council in *Ruddy v. Toronto Eastern R.W. Co.* (1917), 38 O.L.R. 556, 33 D.L.R. 193, affirming the judgment of the Supreme Court of Canada, which reversed the judgment of the Ontario appellate Court, *Re Ruddy and Toronto Eastern R.W. Co.* (1915), 7 O.W.N. 796, to hold that the company was limited by the order of the Minister fixing the location of the towers. The company was willing to make an agreement to confine the easement to that in actual use.

Hellmuth, in reply, argued that the company had no power to make such a contract. The case at bar was not distinguishable from the *Ayr Harbour* case, *supra*. It was quite different

App. Div.
1917
—
RE
COLEMAN
AND
TORONTO
AND
NIAGARA
POWER CO.

from the *Ruddy* case, as here it was not a question of valuing a probability, but a present easement which might be exercised to-morrow. There had been no real attempt by the arbitrators to assess the damages from this point of view. He referred to *In re South Eastern R.W. Co. and Wiffin's Contract*, [1907] 2 Ch. 366.

June 12. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the land-owner from a majority award of \$2,500, being an increase of \$137.50 over a former award made in this matter by the majority of the same board.

The expropriation is of an easement under 2 Edw. VII. (D.) ch. 107, sec. 21 (c.)

The amount originally allowed, \$2,362.50, was based upon the damage by the then existing state of affairs. But it was, on appeal, decided that the land-owner could urge before the arbitrators that he was to be paid for not only that damage, but for all that was caused to him by the power given to the respondent, whether it had in fact exercised it or not, provided its notice covered its user.

In consequence, an order of reference back was made, which, when issued, took the following form: "And this Court doth declare that the said A. B. Coleman is entitled to be compensated for any additional injurious affection to his lands in question in this matter by reason of any further increase in the exercise of the rights of the Toronto and Niagara Power Company under its notice of expropriation served under the Railway Act beyond those that it is now exercising and this Court doth remit the matter to the said arbitrators to assess in addition to the damage already allowed by them the damages for any such additional injurious affection of the said A. B. Coleman's lands by reason of any increase which the said company is entitled to exercise under the said notice of expropriation."

Whether as the result of the inaccurate wording of the order or otherwise, the majority of the arbitrators have, it seems to me, fallen into the error of deciding that what they had to determine was, what additional detriment was caused to the appellant's property by the possible, though improbable, exercise of the unused powers of the respondent to string wires lower down than

at present. The words used in the award are, "and also for any additional injurious affection . . . by reason of any change or increase of the rights of (the respondent) under its notice of expropriation . . . beyond those it is now exercising." What is really in issue is the damage or depreciation caused by reason of the possession and potential use by the respondent of that and its other powers.

That this damage may be largely offset or minimised by the improbability of user to the full extent of the powers possessed, is of course clear. The arbitrators may and should take that into consideration, but they must fix the damage occasioned by the easement or right acquired in terms of the notice—here unlimited—and lessen that only by the consideration of how likely or unlikely it will be to be utilised to the fullest extent.

The easement is comparable to the right in question in the case of *Dolan v. Baker* (1905), 10 O.L.R. 259, in which the legal power to enter and cut trees, over a very long period, although not used, would have a very perceptible influence in decreasing the value of the lot and the timber.

The sum allowed for this element is practically a nominal one, and indicates that the arbitrators considered that added injurious affection was not shewn or was not to be apprehended if it depended upon the actual exercise of the unused power to string wires lower down.

This, as I have pointed out, is not the true point of view. The easement may of course, in a sense, injuriously affect property, but in law it abstracts one element from the whole, and does not leave that whole intact, albeit diminished in value by the acquired right. Consequently what is to be valued is the property, in the owner's hands, subject to the restrictions or easements by which it is affected, though their discharge or the unlikelihood of their use or enforcement must be considered in ease of the loss. See *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, 11 D.L.R. 529, and *Corrie v. MacDermott*, [1914] A.C. 1056.

Mr. McCarthy offered to enter into any agreement necessary to limit the easement to that now in use. It was said that this was beyond the powers of the respondent.

It was incorporated in 1902 by 2 Edw. VII. ch. 107. By sec. 12 it was empowered to "enter upon any private property and

App. Div.
1917
—
RE
COLEMAN
AND
TORONTO
AND
NIAGARA
POWER Co.
—
Hodgins, J.A.

App. Div.
1917

RE
COLEMAN
AND
TORONTO
AND
NIAGARA
POWER CO

Hodgins, J.A.

survey, set off and take such parts thereof as are necessary for such lines of wire, poles or conduits, and in case of disagreement between the company and any owner or occupier of lands which the company may take for any of the purposes aforesaid or in respect of any damages done thereto by constructing the said lines, poles or conduits upon the same, the provisions of the Railway Act hereinafter incorporated shall apply; but nothing herein contained shall give the company the right to expropriate water powers."

By sec. 21, some parts of the then Railway Act (1888, 51 Vict. ch. 29) were incorporated in the respondent's Act, and, among others sections, 90 (general powers) and 136 to 169 (lands and their valuation).

To sec. 21 of the principal Act there is a clause (c.) as follows: "Wherever in the said sections of the Railway Act the word 'land' occurs, it shall include any privilege or easement required by the company for constructing the works authorised by this Act, or any portion thereof, over and along any land, without the necessity of acquiring a title in fee simple thereto."

By the combined effect of these enactments, the respondent had power to take the appellant's land or to acquire an easement to carry its wires etc. across them. Upon giving a notice under sec. 146 of the Railway Act and securing an award, the respondent became entitled to possession of that which its notice covered and to exercise the consequent rights for which compensation must be given.

The power of a corporation to bind itself and its successors not to exercise powers vested in it, or in effect to repeal the provisions of the Act conferring them, is considered in the leading case of *Ayr Harbour Trustees v. Oswald*, 8 App. Cas. 623. The head-note is as follows: "Where the Legislature confer powers on any body, whether one which is seeking to make a profit for shareholders, or one acting solely for the public good, to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good; and a contract purporting to bind such a body and their successors not to use those powers is void."

I think that case is an authority governing the exact point here, and it is followed by Neville, J., in *In re South Eastern R.W. Co. and Wiffin's Contract*, [1907] 2 Ch. 366.

Whether the distinction made by Parker, J., now Lord Parker of Waddington, in *Stourcliffe Estates Co. Limited v. Bournemouth Corporation*, [1910] 2 Ch. 12, can be maintained in all cases, the reason on which it is founded does not exist here, as the covenant offered would necessarily restrict the use of wires and conduits, which is a main and not merely a subsidiary or ancillary power.

I do not think the Court is called on to determine what would be the effect of desistment and a new notice. Such a step has not been taken, and its consequences cannot be dealt with on the present motion.

It was also urged that the arbitrators had no right to deal with the costs of the former arbitration, the award in which was set aside. It appears, however, that the costs of the reference back directed by the judgment were made "costs in the arbitration," which indicates that it was grafted on the former proceedings. Besides this, the reference back was limited to a specific, though improperly described, inquiry, and without what had gone before would not have covered the whole ground.

I do not think the award can be interfered with on this ground, but it must be understood that the statute where applicable must govern.

The proper order to make will be to set aside the present award, and refer the matter back again to be considered by the arbitrators upon the basis and from the standpoint indicated in these reasons. The evidence used before them on both occasions may be used and supplemented in any way by the parties.

In view of the terms of the order of reference back, there will be no costs of this appeal. Those of the new reference ordered will be in the discretion of the arbitrators in so far as they may not be governed by the statutory provision.

App. Div.
1917

RE
COLEMAN
AND
TORONTO
AND
NIAGARA
POWER Co.

Hodgins, J.A.

Appeal allowed.

1917

[APPELLATE DIVISION.]

Jan. 24.
June 12.

RE GINSBERG.

Constitutional Law—Evidence Act, R.S.O. 1914, ch. 76, sec. 7—Intra Vires—Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 38—Examination of Assignor after Assignment for Benefit of Creditors—Refusal to Answer Questions Tending to Criminate—Privilege—Abrogation by Provincial Statute—Criminal Law—Canada Evidence Act, R.S.C. 1906, ch. 145, secs. 2, 5—Protection Afforded by Statutes—Sufficiency.

Upon the examination, under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, of a person who has made an assignment for the benefit of creditors under the Act, he has no right to refuse to answer questions put to him, on the ground that his answers would tend to criminate him—the privilege to refuse to answer which formerly existed has been abrogated by legislative enactment, now contained in sec. 7 of the Ontario Evidence Act, R.S.O. 1914, ch. 76, and recognised by the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 5 (2).

The contention that this privilege was part of the criminal law, and could not therefore be abrogated or restricted except by legislation of the Parliament of Canada, and that the provincial legislation which assumes to take it away is *ultra vires*, is not well-founded.

Chambers v. Jaffray (1906), 12 O.L.R. 377, approved.

The privilege is a civil right, and may be taken away by a Provincial Legislature as to matters with respect to which it has authority to legislate, as it has as to the matters dealt with by the Assignments and Preferences Act.

The question whether sufficient protection has been afforded by the provisions of the Dominion and Ontario Acts to the witness who has been compelled to answer is not for the Court, but for Parliament and the Legislature, to determine.

Semble, if the privilege were part of the criminal law, it had been abrogated by sec. 5 (1) of the Canada Evidence Act, as applied by sec. 2 of that Act. The British North America Act, sec. 91 (27) and sec. 92 (13) and (14), considered.

Order of FALCONBRIDGE, C.J.K.B., reversed.

MOTION by the Consolidated Trust Corporation, assignee for the benefit of creditors of William Ginsberg, to commit William Ginsberg for his refusal to answer questions upon his examination held under sec. 38* of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

*38.—(1) Upon a resolution passed by a majority vote of the creditors . . . or upon the written request of a majority of the inspectors, or upon an order made by the Judge, the assignee may examine upon oath . . . the assignor . . . touching the estate and effects of the assignor, and as to the property and means he had when the earliest of his debts or liabilities existing at the date of the assignment was incurred, and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property since contracting such debt or incurring such liability, and as to any and what debts are owing to him; and the person examined may be required by the assignee to produce upon such examination any property, book, document or paper in his custody, power or control.

(3) The Rules and procedure of the Supreme Court as to the examination of a judgment debtor . . . shall, so far as may be, apply to an examination held under sub-section 1.

January 20. The motion was heard by FALCONBRIDGE, C.J. K.B., in the Weekly Court at London.

P. H. Bartlett, for the applicant.

W. G. R. Bartram, for Ginsberg, the respondent.

1917
RE
GINSBERG.

January 24. FALCONBRIDGE, C.J.K.B.:—The solicitor for the insolvent swears that, in his opinion, it is impossible that the insolvent should be examined in this matter without informing the private prosecutors of evidence which would expose him to a criminal prosecution and would amount to giving evidence wherewith to convict himself.

I suppose it being put as a matter of opinion is the excuse for solicitor or counsel making the affidavit, instead of allowing the client to swear on his own behalf.

Two of the creditors have launched criminal prosecutions against Ginsberg, on the ground that he procured credit on representations as to his financial standing and as to the amount of his assets and liabilities.

I am of the opinion that the protection extended in such cases by both Dominion and Provincial legislation,* that his answers shall not be used or receivable in evidence against him, does not afford sufficient immunity in a case like this. The prosecutors might well get information from him which would enable them to get convicting evidence *aliunde* without using his own evidence against him at all. In fact, the proceedings would take the form of an examination for discovery in a criminal case, which cannot be.

The rule laid down by the Lord Chancellor (Eldon) in 1812 has always been closely followed: 'The strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him, *but that forms one step towards it.*' *Paxton v. Douglas* (1812), 19 Ves. 225, at p. 227. See also *D'Ivry v. World Newspaper Co.* (1897), 17 P.R. 387; *Re Askwith* (1899), 31 O.R. 150; *National Association of Operative Plasterers v. Smithies*, [1906] A.C. 434.

Motion dismissed. No costs.

*The statutory provisions referred to are set out in the judgment of FERGUSON, J.A., *infra*.

App. Div.
1917
—
RE
GINSBERG.

The assignee-corporation appealed from the order of FALCONBRIDGE, C.J.K.B.

The Attorney-General for Canada and the Attorney-General for Ontario were notified, but were not represented on the hearing of the appeal.

March 23 and May 14. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

P. H. Bartlett, for the appellant, argued that the order appealed from was final, not interlocutory, and the appeal lay: *Millar v. Macdonald* (1892), 14 P.R. 499; *J. J. Gibbons Limited v. Berliner Gramophone Co.* (1913), 4 O.W.N. 1068, 10 D.L.R. 825. Upon the merits, he referred to *In re Kay v. Storry* (1904), 8 O.L.R. 45, 51; *Re Lucas Tanner & Co.* (1900), 32 O.R. 1; *Regina v. Fox* (1899), 18 P.R. 343.

J. M. McEvoy and *W. G. R. Bartram*, for Ginsberg, the respondent, argued that the Judge was *persona designata* under the Act. This is not an action, and the respondent is, at most, only a competent, and not a compellable, witness under the Evidence Act. The principle laid down by Lord Eldon in *Paxton v. Douglas*, 19 Ves. 225, 227, should be followed. They relied upon *Weiser v. Heintzman No. 2* (1893), 15 P.R. 407; the reasons of the learned Chief Justice in Chambers; and the cases there cited. They referred also to *Regina v. Boardman* (1871), 30 U.C.R. 553, and *Regina v. Roddy* (1877), 41 U.C.R. 291, and argued that the privilege claimed by the respondent was part of the criminal law, and the provincial legislation, if it was to be read as taking away the privilege, was *ultra vires*.

Bartlett, in reply, argued that this was not a criminal case. The question which arose was a question of evidence, which had always been dealt with by the Provincial Legislature; he referred to the judgment of Ferguson, J., in the *Fox* case, *supra*, which was followed in *Chambers v. Jaffray* (1906), 12 O.L.R. 377. The cases referred to by the Chief Justice below were decided before the Evidence Act; and it is not for the Court to say whether or not the respondent is sufficiently protected under its provisions.

June 12. MEREDITH, C.J.O.:—This is an appeal by the assignee of the respondent from an order of the Chief Justice of

the King's Bench, dated the 31st January, 1917, dismissing the appellant's motion to commit the respondent for his refusal to answer questions put to him on his examination under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

The only question for decision is as to the right of the respondent to refuse to answer questions put to him on his examination, on the ground that his answers would tend to criminate him—in other words, whether the privilege to refuse to answer which formerly existed has been abrogated by legislative enactment.

The basis upon which the argument of the respondent's counsel rests is, that the privilege in question was part of the criminal law, and could not therefore be abrogated or restricted except by legislation of the Parliament of Canada, and that the provincial legislation which assumes to take it away is *ultra vires*.

No case was referred to which supports that contention, and I am of opinion that it is not well-founded.

Effect cannot be given to the contention of the respondent's counsel without overruling *Chambers v. Jaffray*, 12 O.L.R. 377.

That was an action for libel, and the question was as to the right of the defendant to refuse to answer questions put to him on his examination for discovery, on the ground that his answers might tend to criminate him, and it was held by Mulock, C.J., and by a Divisional Court, that his privilege to refuse to answer had been taken away by sec. 5 of the Evidence Act, as enacted by 4 Edw. VII. ch. 10, sec. 21, which is substantially the same as sec. 7 of the Evidence Act, R.S.O. 1914, ch. 76.

It is true that no question was raised as to the constitutionality of the Act—probably because no one was bold enough to suggest a doubt as to its constitutional validity. So far from overruling that case, I am of opinion that it was rightly decided.

Two of the other cases cited by the respondent's counsel make against his contention.

In *Weiser v. Heintzman No. 2*, 15 P.R. 407, the question was, whether the defendant was privileged from answering questions on his examination for discovery on the ground that his answers "might criminate" him. There was then no Ontario legislation abrogating the privilege, though there was Dominion legislation which had that effect. The Dominion Act was relied on by the plaintiff, but the Chancellor pointed out that "that

App. Div.
1917

RE
GINSBERG.

Meredith, C.J.O.

App. Div.
1917
—
RE
GINSBERG.
—
Meredith, C.J.O.

statute, by necessary constitutional limitations, as well as by express declaration, applies only to proceedings respecting which the Parliament of Canada has jurisdiction. . . . As to the procedure in civil causes such as this . . . the Dominion Parliament has no jurisdiction, and therefore the power to enforce incriminating answers by the Canadian Act does not enure to the benefit of purely provincial litigation."

In *Regina v. Fox*, 18 P.R. 343, the question was as to the application of the Evidence Act of Canada to an examination for discovery in an action to recover a penalty under a Dominion statute. There was then no Ontario legislation taking away the privilege, and it was argued that the Ontario law applied; but the Court came to a different conclusion and held that the action was one to which the Canada Evidence Act applied.

Regina v. Roddy, 41 U.C.R. 291, *Regina v. Lawrence* (1878), 43 U.C.R. 164, and *Regina v. Hart* (1891), 20 O.R. 611, do not afford any assistance. In the first case, all that was decided was, that it was not competent for a Provincial Legislature "to declare an act which by the laws of the Dominion is a crime not to be a crime, so as to make persons substantially accused of crime compellable to give evidence against themselves" (p. 297). In the second case, the decision was, that it was not competent for the Legislature to make it an offence under the Liquor License Act to tamper with a witness, because that was a criminal offence at common law, and was therefore a subject within the exclusive legislative authority of the Parliament of Canada. And in the third case, all that was decided was, that a prosecution for a contravention of a municipal by-law was a criminal proceeding to which the Dominion Evidence Act was applicable.

There is also in the Canada Evidence Act, R.S.C. 1906, ch. 145, a clear recognition of the right of the Provincial Legislatures to take away the privilege: sec. 5 (2). This is not, of course, conclusive, but may be considered in determining the question we are called upon to decide.

But, assuming that the privilege is part of the criminal law, I do not see why it has not been abrogated by sub-sec. 1 of sec. 5, the provisions of which are that: "No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to estab-

lish his liability to a civil proceeding at the instance of the Crown or of any person."

Section 2 provides that: "This Part shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

The latter words of sec. 2, if counsel is right, cover the question of privilege, because *ex hypothesi* that is a part of the criminal law, and therefore a matter as to which the Parliament of Canada had jurisdiction to legislate as it did by the subsequent sections.

However that may be, as I have said, I am unable to accede to the argument of the respondent's counsel that the privilege in question is part of the criminal law and can be abrogated only by Dominion legislation.

In my opinion, the privilege is a civil right, and may be taken away by a Provincial Legislature as to matters with respect to which it has authority to legislate, as it undoubtedly has as to the matters dealt with by the Assignments and Preferences Act. When legislative authority was divided between the Dominion and the Provinces, so much of the law of evidence as relates to criminal proceedings fell to the Parliament of Canada, and so much of it as relates to civil proceedings to the Provincial Legislatures; and, the examination of an assignor being a civil proceeding, it was, in my opinion, competent for the Legislature to fashion its law of evidence in reference to it as in its judgment it might deem proper.

The learned Chief Justice was of opinion that the protection afforded by both Dominion and Provincial legislation, that the respondent's answers should not be receivable in evidence against him, "does not afford sufficient immunity in a case like this," and he points out that "the prosecutors might well get information from him which would enable them to get convicting evidence *aliunde* without using his own evidence against him at all." With great respect, that seems to be beside the question he had to determine, which was, whether the privilege had been abrogated. In plain and unmistakable language it is taken away by both enactments. It might have been taken away absolutely, and the question whether sufficient protection has been afforded by the sections to the witness who is compelled to answer is not for the Court, but for Parliament and the Legislature, to determine.

App. Div.
1917

RE
GINSBERG.
Meredith, C.J.O.

App. Div.
1917

RE
GINSBERG.
Meredith, C.J.O.

I would, for these reasons, allow the appeal, reverse the order of the learned Chief Justice, and substitute for it an order requiring the respondent to attend for examination at his own expense and to answer all questions that may be put to him as to the disposition of his property, he having of course the right, by objecting, to obtain the immunity for which the legislation provides.

The costs throughout must be paid by the respondent.

MACLAREN and MAGEE, J.J.A., concurred.

HODGINS, J.A.:—The assignor is examinable under Provincial statute R.S.O. 1914, ch. 134, sec. 38.

In the course of examination objection was taken by the assignor in this "action" (Evidence Act, R.S.O. 1914, ch. 76, sec. 2b), that his answers may tend to criminate him. Under sec. 7, sub-sec. 2, of that Act, his right to refuse to answer, because of this excuse, is taken away so far as the Legislature of Ontario has power so to do.

There can be no doubt that he is a compellable witness in this proceeding, taken under a Provincial statute (ch. 76, sec. 6); and, notwithstanding what was said by Rose, J., in *Regina v. Fox*, 18 P.R. 343, I think the assignor is included in the term "witness." If not, there is nothing to weaken the effect of sec. 6 in making him compellable to give evidence. If the protection given by that section is, on this point, *ultra vires* of the Province, then the result is, that none is afforded.

But it is said that his right to refuse to say anything tending to criminate himself is a right possessed by an individual at common law, and therefore, in such a matter as this, within the domain of criminal law.

The right is a personal right and based on a well-recognised rule of law, which was introduced into this Province with English law. Vaughan Williams, L.J., in *In re X. Y.*, [1902] 1 K.B. 98, at p. 102, says that it is "an extension of the common law rule that you could not call a prisoner to prove the case against himself," and adds: "That was not always a principle of English law. It was evolved by common law Judges, who in the course of time came to the conclusion that it would not further the ends of justice to call a criminal to prove the case against himself."

It applies equally in civil and criminal proceedings, and it arises here in a purely civil matter.

When the right is set up in a civil suit, while its object is protection from future criminal proceedings, its assertion is a matter of civil right. The fact that its motive is a desire to escape the criminal law does not thereby associate it with the criminal law.

I am, therefore, not convinced that the power of the Provincial Legislature to take away what Pollock, C.B., calls a rule of law, is abrogated, because objection is taken that the answer may tend to criminate. I do not think, however, that that question really arises; for, if the witness brings himself within the domain of criminal law by his objection, then the Dominion statute recognises that the Provincial statute compels the witness to testify, and limits the protection to the consequences of the answer, and not to the answer itself.

Looking at both statutes, it would seem odd if a witness from whom both Legislatures have taken away this privilege can escape on the ground that only one has made him a compellable witness, although that one is the only authority that in this particular matter could do so.

I am glad that this conclusion brings our law in regard to the proceedings in question in line with English legislation respecting bankruptcy proceedings: *Regina v. Hiram* (1872), 12 Cox C.C. 174; *The Queen v. Erdheim*, [1896] 2 Q.B. 260.

FERGUSON, J.A.:—This is an appeal by the assignee for the benefit of creditors of the respondent, William Ginsberg, from an order of the Chief Justice of the King's Bench, dated the 31st January, 1917, whereby he dismissed the appellant's application for an attachment against the respondent, William Ginsberg, for his refusal to answer questions upon his examination held under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

William Ginsberg attended for examination and was sworn, but refused to answer questions as to his property and the disposition he had made thereof, on the ground that his answers might tend to criminate him. In this contention he was upheld by the learned Chief Justice. The basis of that opinion appears, I think, in the following quotation therefrom: "I am of the opinion that the

App. Div.
1917

RE
GINSBERG.

Hodgins, J.A.

App. Div.
1917

RE
GINSBERG.

Ferguson, J.A.

protection extended in such cases by both Dominion and Provincial legislation, that his answers shall not be used or receivable in evidence against him, does not afford sufficient immunity in a case like this. The prosecutors might well get information from him which would enable them to get convicting evidence *aliunde* without using his own evidence against him at all. In fact, the proceedings would take the form of an examination for discovery in a criminal case, which cannot be."

The appellant's counsel contends that the question is not what, if any, protection is or should be afforded to a witness, but that it is, has the legislation of the Province of Ontario and of the Parliament of Canada taken away the right of a witness in a civil proceeding to refuse to answer a question on the ground that the answer may tend to criminate him? And that the questions dealt with by the learned Chief Justice, as to what use may be made of the answers or what protection should be granted to a witness, are questions for the Legislature and not for the Court.

The appellant's counsel argued before us that the proceeding taken to examine the respondent was a civil proceeding, affecting civil procedure and property and civil rights, and that the Province of Ontario, having exclusive jurisdiction under clauses (13) and (14) of sec. 92 of the British North America Act, had, by the Evidence Act (Ontario), R.S.O. 1914, ch. 76, sec. 7, taken away the right of a witness in such a proceeding to refuse to answer a question which might tend to criminate him; and, further, that, if the right was, as claimed by the respondent, part of the criminal law, then that the Parliament of Canada has, by the Evidence Act (Canada), R.S.C. 1906, ch. 145, secs. 2 and 5, taken away the right.

Counsel for the respondent argued that the Evidence Act (Ontario) was *ultra vires*, in that, according to his view, "it purports so to alter *the criminal law* as to compel any one of His Majesty's subjects unwillingly to become a witness, and, being so compelled to become a witness, then to be compelled to answer questions tending to criminate himself." The respondent's counsel further argued that the right to refuse to answer such a question was part of the criminal law; that the Canada Evidence Act did not cover or extend to the right to refuse to answer questions which were put in proceedings in civil

matters, over which exclusive jurisdiction was, by the British North America Act, conferred on the Province; and that sec. 2 of the Canada Evidence Act limited the application of sec. 5 of the Act to questions put in a criminal *proceeding* or questions put in a *proceeding* respecting a matter in which the Parliament of Canada had exclusive jurisdiction.

In Broom's Legal Maxims, 7th ed., p. 743, it is stated to be a characteristic principle of English law that no man can be compelled to criminate himself.

In Taylor on Evidence, 8th ed., p. 1243, it is said: "This rule—which is of great antiquity and even acted upon by Chief Justice Jeffries when it told *against* the prisoner—applies equally to the parties and to witnesses, and it is now uniformly recognised by all British Tribunals, whether civil or criminal."

In Starkie's Law of Evidence, 4th ed., this rule is discussed at p. 204, and it is there stated that a witness is not bound to answer any question, either in a Court of Law or Court of Equity, if his answer will expose him to any criminal punishment or tends collaterally to convict him, agreeably to the wise and humane principle that no man is bound to criminate himself, referring to *Rex v. Barber* (1720), 1 Strange 444.

The rule is discussed in Odgers' Law of Evidence (1911), p. 220, and is shewn to have been from time to time modified by statute, particularly in bankruptcy proceedings; but I think it is clear that the rule was a long and well-established principle of our law, applying to civil and criminal proceedings alike, and, unless it has been taken away by statute, must be given effect to. See also *Regina v. Hart*, 20 O.R. 611; *Weiser v. Heintzman No. 2*, 15 P.R. 407; and *Regina v. Fox*, 18 P.R. 343.

In order that they may be more readily considered, I here set out the parts of the statutes which I think bear upon the questions raised:—

The British North America Act, sec. 91: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of

App. Div.

1917

RE

GINSBERG.

Ferguson, J.A.

App. Div.
1917
—
RE
GINSBERG.
—
Ferguson, J.A.

this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say . . . (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

The Canada Evidence Act, R.S.C. 1906, ch. 145, secs. 2 and 5:—

"2. This Part shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

"5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

"(2) If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any Provincial Legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such Provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

The British North America Act, sec. 92: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: . . . (13) Property and civil rights in the Province. (14) The administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts."

The Ontario Evidence Act, R.S.O. 1914, ch. 76, sec. 7:—

"7.—(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate

him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of this Legislature.

“(2) If, with respect to any question, a witness objects to answer upon any of the grounds mentioned in sub-section (1), and if, but for this section or any Act of the Parliament of Canada, he would therefore have been excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceedings under any Act of this Legislature.”

If it were clear that the right claimed was part of the criminal law of Canada, I would still be of the opinion that the Province, in exercising its exclusive jurisdiction over the administration of justice in the Province, including procedure in civil matters and over property and *civil rights* as conferred by sec. 92 of the British North America Act, was empowered to, and has, by sec. 7 of the Evidence Act of Ontario, taken away the right of a witness, in a civil proceeding affecting property and civil rights within the exclusive jurisdiction of the Province, to refuse to answer a question on the ground that his answer might tend to criminate him; but, as I read the Canada Evidence Act, the right claimed by the respondent is not now part of the criminal law of Canada.

Section 2 of the Canada Evidence Act makes the provisions of sec. 5 of the Act applicable not only to all criminal proceedings and all civil proceedings, but to all other matters whatsoever respecting which the Parliament of Canada has jurisdiction, and it will be seen from a perusal of parts of sec. 91 of the British North America Act (*supra*) that the Parliament of Canada has jurisdiction not only in criminal proceedings but in the criminal law. Therefore, reading secs. 2 and 5 of the Evidence Act together with sec. 91 of the British North America Act, these sections would, I think, read: “In all criminal proceedings and in all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in that behalf, that is, among other things, in the criminal law and in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislature of the Province, no witness shall be

App. Div.
1917

RE
GINSBERG.

Ferguson, J.A.

App. Div.
1917

RE
GINSBERG.

—
Ferguson, J.A.

excused from answering any question on the ground that the answer to such question may tend to criminate him," etc.

If I be right in so reading the statutes, then the right claimed by the respondent is not now part of the criminal law of Canada, and the argument advanced on behalf of the respondent fails.

For these reasons, I am of the opinion that the Province, in the exercise of its jurisdiction over the administration of justice and procedure in civil matters affecting property and civil rights, had the power, exercised by sec. 38 of the Assignments and Preferences Act, to compel the respondent to attend and submit for examination as to his property etc., and also the further right, exercised by sec. 7 of R.S.O. 1914, ch. 76, of taking away the respondent's right in a civil proceeding to refuse to answer a question which might tend to criminate him; and that, in exercising such power, the Province did not take away or infringe any right which the respondent was entitled to as part of the criminal law of Canada.

The question, whether or not the Legislature extended to a witness thus compelled to answer proper protection or sufficient protection, is not, I think, a question for the Court; for, no matter what our opinion may be as to the justice of the legislation, it must be our duty to give effect to the statute.

I would allow the appeal.

Appeal allowed.

[APPELLATE DIVISION.]

1917

June 12.
July 25.

UNION NATURAL GAS CO. v. CHATHAM GAS CO.

Parties—Contract for Supply of Natural Gas—Injunction—Addition of Sub-purchaser as Party—Necessary Party—Rule 134—New Trial.

Upon the hearing of appeals by both parties from the judgment of LENNOX, J., 38 O.L.R. 488, attention was called to the fact that the Dominion Sugar Company was not a party to the action, although its contract with the defendants was attacked by the plaintiffs. After consideration, the Court directed a new trial, with liberty to the plaintiffs to add the sugar company as a party defendant; and it was *held*, that the action was not properly constituted; that the case came within Rule 134, for, without the presence of the sugar company, it was impossible to say that the Court could effectively and completely adjudicate upon the questions involved in the action, and if the sugar company was not added the Court would be prevented from effectively doing justice.

Review of the authorities.

Hartlepool Gas and Water Co. v. West Hartlepool Harbour and R.W. Co. (1885),
12 L.T.R. 366, followed.

1917
—
UNION
NATURAL
GAS Co.
v.
CHATHAM
GAS Co.

APPEAL by the plaintiffs from that portion of the judgment of LENNOX, J., 38 O.L.R. 488, which declared that, on the true construction of the agreement entered into between the plaintiffs and the defendants of the 3rd November, 1906, as amended by the agreement dated the 11th March, 1907, the defendants were entitled (save as in the judgment provided) to be furnished with gas by the plaintiffs for the supply by the defendants to their customers in territory which was not, at the date of the agreement, within the corporate limits of the city of Chatham, but which had been annexed by the city corporation since that date; and appeal by the defendants from that portion of the same judgment which restrained the defendants from diverting gas supplied by the plaintiffs to the defendants, under the said agreement as amended, to the Dominion Sugar Company or to or for the purposes of that company's sugar factory, under or pursuant to the agreement entered into by that company with the defendants, dated the 15th November, 1915, and from diverting gas so supplied by the plaintiffs to the defendants to or for the purpose of the sugar factory under any agreement thereafter entered into or under any condition thereafter arising, unless and until the Court or a Judge thereof, upon an application made in this action, should sanction and approve thereof.

April 16, 17, and 18. The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and ROSE, J. W. N. Tilley, K.C., and J. G. Kerr, for the plaintiffs.

I. F. Hellmuth, K.C., and J. M. Pike, K.C., for the defendants.

The question as to parties dealt with in the judgment below was raised by the Court during the argument.

The case was fully argued upon the merits, but it is not necessary, in view of the decision as to parties, to report the arguments.

June 12. The judgment of the Court was read by HODGINS, J.A.:—Attention was called during the hearing of the appeal to the fact that the Dominion Sugar Company was not a party to

App. Div.
1917
—

UNION
NATURAL
GAS Co.
v.
CHATHAM
GAS Co
—

Hodgins, J.A.

the action, although its contract with the defendants was attacked by the plaintiffs.

Paragraph (2) of the judgment in appeal is as follows: "And this Court doth order and adjudge that, subject to the provisions hereafter contained, the defendant, its officers, servants, and agents, be and they are hereby perpetually restrained from diverting gas supplied by the plaintiffs to the defendants under the said agreement dated the 3rd day of November, 1906, as amended by the said agreement dated the 11th day of March, 1907, to the Dominion Sugar Company Limited in the pleadings mentioned, or to or for the purposes of its sugar factory, under or pursuant to the agreement entered into by said Dominion Sugar Company Limited with the defendants, dated the 15th day of November, 1915, and from diverting gas so supplied by the plaintiffs to the defendants to or for the purposes of the said sugar factory, under any agreement hereafter entered into or under any conditions hereafter arising, unless and until this Court or a Judge thereof, upon an application made herein, sanctions and approves thereof."

This adjudication virtually annuls the sugar company's agreement, or at all events deprives that company of any right to specific performance, and places it under such a disability that it cannot make an agreement with the defendants except by the permission of the Court. I think the latter prohibition cannot be upheld.

As to the judgment, so far as it restrains the defendants from complying with the sugar company's agreement and supplying gas thereunder, there is a difficulty in the plaintiffs' way. That agreement is not merely an agreement for gas generally, but is limited to the gas received by the defendants from the plaintiffs under the agreements between them. It recites those agreements, and then provides that the supply of gas derived thereunder shall continue so long as natural gas can be obtained or secured by the defendants under and pursuant to the terms of those agreements.

It also stipulates that the defendants shall lay down the necessary pipes etc. from the place of delivery by the plaintiffs for the purpose of such supply, and that the sugar company shall have the benefit of the preferences or prior rights given in the said agreements, and for the purpose of enforcing the preference the sugar company may use the name of the defendants in taking action to compel a supply.

Another clause of the agreement provides for what is to happen on default in delivery or in the maintenance of the lines in a serviceable condition or by reason of want of diligence in finding gas in sufficient quantity. In such a case the sugar company has the right to take action to compel both the defendants and the plaintiffs to act up to the terms of the agreements.

I think these provisions distinguish this case from others in which it might be said that a contract for the supply of a commercial article between two parties may be attacked in litigation between them without bringing in a sub-purchaser or a person to whom the purchaser is to hand over the article bargained for under the contract. In that case the remedy would be in damages, and the sub-purchaser would be expected to go into the market and supply himself. Here, however, while such a course might be open and might be taken by the sugar company—see *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105—the other rights given by the contract would entitle the sugar company to a larger remedy than mere damages. Besides this, if the learned trial Judge's view of the relations of the plaintiffs and defendants, as that of partners, is sustainable, then there is all the more reason why the outsider should be heard in his own interest, and not left in the lurch in the settlement of the partnership difference. The contract is described as one-sided, perplexing, and practically unworkable, rendering it a very difficult thing for the sugar company in any subsequent litigation to overcome this handicap.

The rule laid down in *Hartlepool Gas and Water Co. v. West Hartlepool Harbour and R.W. Co.* (1885), 12 L.T.R. 366, should be followed. There the defendants had covenanted to take all their water from the plaintiff company, and had then leased to S. their shipbuilding yard and its own supply of water. Kindersley, V.-C., in refusing the plaintiffs an injunction against the defendants restraining their further supplying the water to S., said (p. 368): "Inasmuch as they have entered into this lease or contract, I cannot grant an injunction without doing such prejudice to S. as ought not to be done to an absent party. It is not because the defendants would not be liable to an action by S., or to any inconvenience which might arise, but it is because the Court, upon principle, will not ordinarily and without special necessity, interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the Court."

App. Div.
1917

UNION
NATURAL
GAS CO.
v.
CHATHAM
GAS CO.

Hodgins, J.A.

App. Div.
1917

UNION
NATURAL
GAS CO.
v.
CHATHAM
GAS CO.

Hodgins, J.A.

It may be noted in passing that in the well-known case of *Lumley v. Wagner* (1852), 1 DeG. M. & G. 604, the impresario with whom the defendant had made a contract to sing otherwise than as permitted by the plaintiff's contract, was made a defendant to the action for an injunction.

In *Wilson v. Church* (1878), 9 Ch. D. 552, one dissenting bondholder was added as a defendant by Jessel, M.R., on the application of the defendant, expressly because his rights and interests would be affected.

In *McCheane v. Gyles No. 2*, [1902] 1 Ch. 911, Buckley, J., refers to *Dix v. Great Western R.W. Co.* (1886), 34 W.R. 712, and lays down the principle, upon which I think the Court has generally acted, namely, that, in order to add a defendant against the plaintiff's wishes, you must be able to shew either that the party added ought to have been joined or that his presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon what is involved in the cause or matter.

Dix v. Great Western R.W. Co. (ante) enunciated the same principle, and applied it in the case where there were two other covenantees interested in the covenant to make a road.

In *Metropolitan District R.W. Co. v. Earl's Court Limited* (1911), 55 Sol. Jour. 807, Lush, J., restricted the injunction against the improper use of the leased land so as not to include the acts of the under-lessee because he was not a party.

In *Cornell v. Smith* (1890), 14 P.R. 275, Meredith, J. (now C.J.C.P.), said as to the next of kin (p. 276): "A determination in favour of the plaintiffs . . . though not binding on them, could not but be prejudicial to them in any future contests over the same matter, if it would not, as it might, deter them from litigating the matter over again, and so be practically an adjudication upon their rights behind their backs. It is in the interests of justice, as well as of the parties, that there should not be double or more frequent trials of the same questions between different parties."

Our Rule 134* is substantially the same as the English Rule

*134.—(1) The Court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined, be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action, be added; . . .

and enforces the same principle. I think this case is one within that Rule, and that, without the presence of the sugar company, it is impossible to say that the Court can effectively and completely adjudicate upon the questions involved in the action, and that if the sugar company is not added the Court will be prevented from effectively doing justice. That company's interests and property are directly affected by the judgment, and if it is not present and can litigate again, or if its rights are practically altered or limited, then the Rule in question exactly fits the case.

The principle I have mentioned is not confined to England and Canada. It has been applied in the United States by the Supreme Court in the case of *Minnesota v. Northern Securities Co.* (1902), 184 U.S. 199. The matter involved there was the right of minority shareholders to object to a railway company obtaining and exercising ownership and control of two or more competing railways. Mr. Justice Shiras, in dealing with the objection to which he gave effect, said (p. 235): "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the Court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Plds. sec. 72."

I am therefore of the opinion that this action is not properly constituted, and that a new trial should be ordered. If, however, the parties agree to add the sugar company forthwith, and the sugar company is willing to have the case decided upon the argument already had, the Registrar can be so notified. If, however, further pleadings or evidence is required, the parties may attend before a Judge of this Divisional Court, who will settle the exact terms of the order to be made.

App. Div.
1917

UNION
NATURAL
GAS CO.
v.
CHATHAM
GAS CO.

Hodgins, J.A.

App. Div.
1917

UNION
NATURAL
GAS CO.

v.
CHATHAM
GAS CO.

Hodgins, J.A.

July 25. HODGINS, J.A.:—The view of the Court is, that in this case the costs of the action up to the time when the parties were at issue should be reserved to be dealt with in the discretion of the new trial Judge, and that there should be no costs of the action from that time up to and including the trial and judgment.

The costs of the appeals should be to the defendants in any event.

[The order of the Court, as settled and issued, set aside the judgment of LENNOX, J., and directed that a new trial be had between the parties to this action, with liberty to the plaintiffs to add the Dominion Sugar Company as a party defendant. An appeal from the order to the Supreme Court of Canada is pending.]

1917

[APPELLATE DIVISION.]

June 14.

RE HIRAM WALKER & SONS LIMITED AND TOWN OF WALKERVILLE.

Assessment and Taxes—Appeal from Order of Ontario Railway and Municipal Board—Question of Fact—Assessment Act, R.S.O. 1914, ch. 195, sec. 80 (6) —Business Assessment—"Business of a Distiller"—Sec. 10 (1) (a) of Act.

By sec. 10 (1) (a) of the Assessment Act, "every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called 'Business Assessment'
(a) Every person carrying on the business of a distiller for a sum equal to 150 per cent. of the assessed value."—

Held, that the Court could not judicially know what "the business of a distiller" was; and the contention of a distilling company before the Ontario Railway and Municipal Board, that only that part of the company's premises in which the process of distillation took place was to be taken into account in ascertaining the amount for which the company was assessable, raised a question of fact only for the Board; and, under sec. 80 (6), no appeal lay from the Board's decision.

Semble, where it is shewn that a distiller, in addition to distilling, warehouses the product of distillation and also blends liquors from the process of distillation and warehouses these liquors, the words "the business of a distiller" may embrace all these branches of the business.

Remarks on the construction of taxing Acts.

Attorney-General v. Salt Union Limited (1917), 33 Times L.R. 365, [1917] 2 K.B. 488, referred to.

An appeal by Hiram Walker & Sons Limited, an incorporated company, from an order of the Ontario Railway and Municipal Board, dismissing an appeal by the appellant company from an order of the Judge of the County Court of the County of Essex, dismissing an appeal from the decision of the Court of Revision

for the Town of Walkerville, which confirmed the "business" assessment of the appellant company.

March 20. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. W. Anglin, K.C., and J. H. Coburn, for the appellant company, argued that the words "business of a distiller," as used in the Assessment Act, meant only the part of the business carried on in the distillery up to the point of rectification. After that point is reached, the product of distillation is blended and warehoused, and only that part of the appellant company's premises which is used for the purpose of distillation, apart from blending and warehousing, should be considered as used in the business of a distiller, under sec. 10 (1) (a) of the Act. The evidence shews that the distillery, in its proper sense, is not the "preponderating business," under sub-sec. (3) of sec. 10, of those which are carried on in the appellant company's premises. A taxing statute should be strictly construed.

E. D. Armour, K.C., and J. Sale, for the respondent corporation, argued that either there is no definition given by statute of what is meant by the business of a distiller, or it must be taken in the sense given to it by the Inland Revenue Act, R.S.C. 1906, ch. 51. If that Act cannot be looked at, then it is a pure question of fact, as to which there is no appeal from the decision of the Board: R.S.O. 1914, ch. 195, sec. 80 (6).

Anglin, in reply, argued that the interpretation of the word "distillery" was not governed by the Inland Revenue Act. The question for decision was one of mixed law and fact, and was appealable.

June 14. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by Hiram Walker & Sons Limited from an order of the Ontario Railway and Municipal Board, dated the 17th January, 1917, dismissing the appellant's appeal from an order of the Judge of the County Court of the County of Essex, which dismissed its appeal from the Court of Revision, which had confirmed the assessment of the appellant for business assessment.

The contention of the appellant is, that its business consists not only of that of distilling, but also of blending liquors, and

App. Div.
1917

RE
HIRAM
WALKER
& SONS
LIMITED
AND
TOWN OF
WALKER-
VILLE.

App. Div.
1917

—
RE
HIRAM
WALKER
& SONS
LIMITED
AND
TOWN OF
WALKER-
VILLE.
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Meredith, C.J.O.

warehousing the product of distillation, as well as the liquors which are blended; and that only that part of the premises in which the process of distillation takes place is to be taken into account in ascertaining the amount for which the appellant is assessable under clause (a) of sub-sec. 1 of sec. 10* of the Assessment Act, R.S.O. 1914, ch. 195.

In my opinion, an appeal does not lie from the decision of the Board, the question raised being, as I think, one of fact and not of law: sec. 80 (6).†

The case was argued by Mr. Anglin as if the legislation imposed taxation in respect of a "distillery." The question in such a case would be a very different one from that which arises when the taxation is in respect of "the business of a distiller." The Court cannot, I think, know judicially what such a business is, and the question of what it is must therefore be a question of fact. I do not think that there can be any reasonable doubt that, where it is shewn that a distiller, in addition to distilling, warehouses the product of distillation and also blends liquors from the process of distillation and warehouses these liquors, the business of distiller as used in the clause may embrace all these branches of the business.

If there were a business assessment imposed upon persons carrying on the business of chemists or of druggists, could it be seriously argued that only the premises used in the work of compounding medicines was to be taken into account? Every one knows that a druggist does not confine his business activities to the compounding and selling of medicines, and yet all outside of that part of his business, according to the contention of the appellant, must be excluded in determining the liability to taxation or

*10.—(1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "Business Assessment" to be computed by reference to the assessed value of the land so occupied or used by him, as follows:—

(a) Every person carrying on the business of a distiller for a sum equal to 150 per cent. of the assessed value.

†80.— . . . (6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said Court upon application of any party and upon hearing the parties and the Board.

the extent of the liability. Such considerations as these appear to me to shew that the question must be one of fact in each case; the question being what is generally understood to be comprehended in the particular business designated.

Clause (b) of sec. 10 (1) deals with the business of a brewer. If the brewer barrelled the product of his brewing and delivered it by his own horses and waggons, and his barrelling works and stables were connected with the brewing-house, would not the "business of a brewer" in such a case include these elements, if I may so term them, of the business he was carrying on?

The questions which fell to be determined by the Board were: (1) what was the "business of a distiller" as applied to the business the appellant is carrying on? (2) If each branch of the appellant's business is to be treated as a separate business, what was the chief or preponderating one (sec. 10 (3)*)? And (3), whether these branches of the appellant's business were carried on on the "same premises," within the meaning of sec. 10 (3).

These questions were, in my opinion, questions of fact; and, that being the case, as I have said, no appeal lies from the decision of the Board; and I would, for that reason, dismiss the appeal with costs.

I observe that Mr. Coburn, in his argument before the Board, contended that the Assessment Act, being a taxing Act, must be construed strictly. I may point out what was said by Lush, J., in the recent case of *Attorney-General v. Salt Union Limited* (1917), 33 Times L.R. 365, [1917] 2 K.B. 488. The question in that case was, whether brine was a "mineral" within sec. 20 of the Finance Act, 1910, and the learned Judge said that, in dealing with a taxing Act or any other Act, the word "minerals" "must be construed in the widest possible way;" and that, although the language of a taxing Act must be clear and unequivocal, "one must construe words in their ordinary sense and give their ordinary effect to them."

Appeal dismissed with costs.

*10.— . . . (3) No person shall be assessed in respect of the same premises under more than one of the clauses of sub-section 1, and where any person carries on more than one of the kinds of business mentioned in that sub-section on the same premises, he shall be assessed by reference to the assessed value of the whole of the premises under that one of those clauses in which is included the kind of business which is the chief or preponderating business of those so carried on by him in or upon such premises.

App. Div.
1917

RE
HIRAM
WALKER
& SONS
LIMITED
AND
TOWN OF
WALKER-
VILLE.

Meredith, C.J.O.

1917

[MASTEN, J.]

June 14.

GABEL v. HOWICK FARMERS MUTUAL FIRE INSURANCE CO.

Insurance—Fire Insurance—Proofs of Loss—Failure of Assured to Make Statutory Declaration—Mistake—Further Proofs not Demanded—Insurance Act, R.S.O. 1914, ch. 183, sec. 194 (condition 18 (c)); sec. 199—Inequitable Result if Forfeiture Decreed—Application for Insurance—Failure to Disclose Apprehension of Incendiarism—Question in Application Left Unanswered—Disclosure by Assured to Agent of Insurance Company—Failure of Agent to Communicate to Company—Issue of Policy without Answer to Question being Insisted upon—Waiver—Unreasonable Condition in Application—Sec. 197 of Act—Liability of Company.

In an action upon a policy of fire insurance it was conceded that there was an honest loss, and the amount claimed was not disputed. The statutory declaration furnished by the assured, pursuant to condition 18 (c) sec. 194 of the Insurance Act, R.S.O. 1914, ch. 183, was not made by the assured, but by his two representatives on the board of inspection and valuation. In other respects the proofs of loss were in proper form; no objection was made to them by the insurance company, nor were further or other proofs asked for. The assured's failure to make the statutory declaration was found to have been caused by a mistake, and it was also found that the company were not prejudiced:—

Held, applying sec. 199 of the Act, that it would be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with condition 18 (c).

The assured signed a printed application in which the amount of insurance sought was filled in, but which was otherwise in blank. At the time of signing, incendiarism was apprehended by the assured; the question in the application, "Is incendiarism threatened or apprehended?" was not answered "yes" or "no," but a horizontal line was drawn which filled up the space left for the answer:—

Held, that this indicated that the question was not answered at all.

Held, also, that the danger was a circumstance material to be made known to the company in order to enable them to judge of the risk, and was not disclosed to the company by the printed application as sent to the company.

The assured left F., the insurance-agent, to fill in the application and send it to the company, thus making F. his agent for that purpose. The facts creating the apprehension of incendiarism were disclosed by the assured to F. before the application was signed. F. was a general agent of the company with large powers:—

Held, that notice to F. was notice to the company.

Held, also, that the assured was responsible for the answers made in the application; but F. owed a duty to the company to disclose the material facts that had been made known to him respecting the danger; the company, receiving the application with the question unanswered on the face of it, did not send it back and insist on an answer to the question, but accepted the risk and issued a policy, thereby waiving an answer to the question in the printed application, and leaving the matter in the same situation as if the question had not been there.

Disclosure was essential, but could be effectively made *dehors* the answers in the printed form; disclosure to the agent was disclosure to the company; and any provision to the contrary in the conditions or application was in this case unreasonable and ineffective (sec. 197 of the Act).

Sinclair v. Canadian Mutual Fire Insurance Co. (1876), 40 U.C.R. 206, 212, and *Graham v. Ontario Mutual Insurance Co.* (1887), 14 O.R. 358, followed.

ACTION upon a policy of fire insurance.

June 5. The action was tried by MASTEN, J., without a jury at Guelph.

L. G. McCarthy, K.C., and *J. Bray*, for the plaintiffs.

H. Guthrie, K.C., and *W. M. Sinclair*, for the defendants.

1917
GABEL
v.
HOWICK
FARMERS
MUTUAL
FIRE
INSURANCE
Co.

June 14. MASTEN, J.:—The plaintiffs' claim is on a policy of fire insurance for \$5,000, dated the 8th November, 1916, issued by the defendant company, covering, among other, the following property:—

Amount insured.

- | | |
|--|------------|
| (1) On barn and attachments and stable under..... | \$1,500.00 |
| (2) On pump-house..... | 50.00 |
| (3) On carriage-house..... | 200.00 |
| (4) On ordinary contents of barn and outbuildings..... | 1,950.00 |

The loss, if any, was made payable to the plaintiff Marks, mortgagee, as his interest might appear. At the time this policy was issued the plaintiff Gabel held a policy with the defendant company for \$4,000, number 35685, which still had over a year to run. The policy sued on is expressed on its face as "cancelling and replacing policy No. 35685."

Certain of the insured property was destroyed or injured by fire on the 1st December, 1916, the amount of the loss so incurred being stated as follows:—

On barn—a total loss—value.....	\$2,300.00
Injury to driving-shed and pump-house.....	30.00
On contents (loss).....	2,254.85
	<hr/>
	\$4,584.85

Consequently, the amount claimed pursuant to the policy is \$3,480 (being \$1,500 plus \$30 plus \$1,950). The amount of the loss so claimed is not disputed, but two defences are raised by the company: first, that in applying for the insurance the assured misrepresented or omitted to communicate to the defendant company a circumstance material to be made known to it in order to enable it to judge of the risk it undertook; second, that the assured failed to deliver proofs of loss pursuant to statutory conditions 17 and 18, sec. 194 of the Insurance Act, R.S.O. 1914, ch. 183.

The facts on which these two defences are based may be briefly stated as follows:—

Masten, J.

1917

GABEL

v.

HOWICK
FARMERS
MUTUAL
FIRE
INSURANCE
Co.

On the evening of Friday the 29th September, 1916, the plaintiff Gabel found on his barn-floor two small heaps of coals, one dead and one alive, which he believed had been placed there by an incendiary with intent to burn his barn. The plaintiff Gabel at once visited his neighbour and friend, one John Noble, and told him, "Some one is trying to burn me out." Noble went back home with the plaintiff Gabel, and together they sat up most of Friday night, guarding the plaintiff's barn against a further expected attempt to burn it.

On Saturday morning, the 30th September, the plaintiff Gabel and one Cook went together to Palmerston in an endeavour to find out the person who had placed the coals on the barn-floor. While in Palmerston they met one Fallis, with whom the plaintiff Gabel had previously dealt in placing his insurance, and who had been the regular local agent of the defendant company for twenty years. The attempt made the night before on the plaintiff's barn seems already to have become public, for Fallis had heard of it when they met him, and naturally the incident was discussed. In the course of this conversation it was suggested, I think by the plaintiff Gabel, that he ought to have a larger amount of insurance on his buildings. He says he had had this in contemplation for some time, and the incident of the night before emphasised to him its importance. Fallis said he would bring the increase before the board of the defendant company. This interview with Fallis occurred on Saturday the 30th September. On Monday the 7th October, Fallis drove out to the farm of the plaintiff Gabel, taking with him a blank form of insurance-application, which, after inserting \$5,000 as the amount required, he procured the plaintiff to sign in blank, and then took it away with him to fill it up and send it in to the defendant company. At the time of this visit, the plaintiff Gabel took Fallis out to the barn and shewed him the marks on the barn-floor where the coals had been found. The application so signed by the plaintiff Gabel, and afterwards filled in by Fallis, is dated the 7th October, 1916, and the portions thereof bearing on the issue raised in this action are as follows:—

"Is incendiarism threatened or apprehended?—"

"And the said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full, and true statement and exposition of all the facts and circumstances in

respect to the condition, situation, value of and all other matters therein set forth, as to the property and the risk of the property to be insured, and agrees and consents that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance-contract; and the said applicant also agrees that the agent taking this application is to be considered his agent for the purpose of making this application, and not the agent of the company, and that the company shall not be bound by any statement made by or to such agent not contained in the foregoing application."

The application was sent in, and the additional insurance was granted; the policy was issued by the defendant company, and the old policy for \$4,000 cancelled.

The premises were destroyed by fire on the 1st December, 1916, and, as I have already mentioned, the amount of the loss as claimed in this action is not disputed—the contest is as to liability only.

The occurrence of the fire was notified to the defendant company on the 2nd December, and the directors became aware on that day of the attempt at incendiarism in the previous September. On or about the 4th December, John Jackson, the president of the defendant company, and Bryans and Edgar, two of the directors, went to the plaintiff Gabel's house, and there met Manning, Noble, and Livingstone, representing the plaintiff. This meeting appears to have been in lieu of an inspection and appraisal of loss, for the purpose of ascertaining the amount (if any) payable by the company, as well as to ascertain the circumstances surrounding the fire. And it is, no doubt, in consequence of what the directors then learned that the amount of the loss is not now disputed. As I understand the evidence, the amount of the loss was practically, though not formally, agreed upon at this meeting, the question of liability remaining open.

On this occasion, the president and directors of the defendant company left with the plaintiff forms of proof of loss to be filled up and sent in. All of these forms (including a schedule, signed by the claimant, making his claim at \$3,480) were properly executed, except only—that the statutory declaration, though made out in the name of George Gabel, is sworn to by John N. Livingstone and George Noble, two of the plaintiff's representatives on the board of inspection and valuation. These proofs of loss are dated

Masten, J.

1917

GABEL

v.

HOWICK
FARMERS
MUTUAL
FIRE
INSURANCE
Co.

Masten, J.
 1917
 GABEL
 v.
 HOWICK
 FARMERS
 MUTUAL
 FIRE
 INSURANCE
 Co.

the 9th December, and were sent in to the company on that date or shortly afterwards. No objection was made to them by the company, and no further or other proofs of loss were ever asked by the company. I have no doubt that the directors were fully satisfied of the reality and amount of the loss. The objection now raised on this score must be overruled. Acting under the provisions of sec. 199* of the Insurance Act, I find that failure to make the statutory declaration in proper form arose from mistake. I find that no prejudice has arisen to the defendant company. I find that the plaintiff Gabel did sign the schedule setting forth the amount of the claim which is now admitted. I find that no further or other proofs of loss have been asked for, and I hold that under these circumstances it would be inequitable that this insurance should be deemed void or forfeited for imperfect proofs of loss or from failure to furnish the plaintiff's declaration as called for by statutory condition 18 (c).† I refer to *Prairie City Oil Co. v. Standard Mutual Insurance Co.* (1910), 44 S.C.R. 40; and to *Bell Brothers v. Hudson Bay Insurance Co.* (1911), 44 S.C.R. 419.

Before discussing the defence based on misrepresentation of a fact material to the risk, I should observe that no suggestion has been made that this is not an honest loss. The actual loss is greater than the insurance. The insured had carried insurance with the defendant company for twenty years or more, and never made a claim, and at the time when the policy sued on was issued

*199. Where, by reason of necessity, accident or mistake, any conditions of a policy of insurance on property in Ontario as to the proof to be given to the insurer after the occurrence of the event insured against has not been strictly complied with, or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any condition of such policy, the insurer through its agent or otherwise objects to the loss upon other grounds than for imperfect compliance with such condition or does not within a reasonable time after receiving such statement or proof notify the assured in writing that it is objected to, stating the particulars in which the same is alleged to be defective, and so from time to time, or where for any other reason it is held to be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such condition no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof, as the case may be, shall be allowed as a defence by the insurer or a discharge of his liability on such policy wherever entered into.

†18. Any person entitled to make a claim under this policy shall

- (a) Forthwith after loss give notice in writing to the company;
- (b) Deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits;
- (c) Furnish therewith a statutory declaration declaring,
 That the account is just and true;
 When and how the loss occurred . . .

he held an unexpired policy for \$4,000, for which the present policy was substituted; and to the surrendered policy this defence could not have been raised.

I find that on the 7th October incendiarism was apprehended. I find that this danger was a circumstance material to be made known to the insurance company in order to enable them to judge of the risk they undertook. I find that it was not disclosed to the company by the printed application. The company contend that the printed application described above answers the question in the negative.

I am unable to agree with that contention. I think that the "———" inserted as an answer to the question "Is incendiarism threatened or apprehended?" indicates that the question is not answered at all.

I find that the plaintiff Gabel signed an application in which the amount of insurance sought was stated, but which was otherwise in blank, and that he left the insurance-agent Fallis to fill in the application and send it in, thus making Fallis, for the purposes of the printed application, the agent of the assured, and that the plaintiff Gabel is responsible for the answers so made. I find that the facts respecting the supposed attempt at incendiarism on the 29th September were, before the 7th October, fully disclosed to James Fallis, who appears to have been one of the three largest writers of insurance in the defendant company, had been their agent for more than twenty years, and was entitled not only to receive applications and premiums, but to issue interim receipts, insuring property and making the defendants liable on the risk before formal passing on the risk by the board.

Fallis was thus in a dual capacity. He was the agent of the insured to complete and file his written application, and as such it was his duty to answer the question regarding incendiarism. In this he failed, and this failure must be taken to have the same effect as though the plaintiff Gabel himself had filled up and put in the application without the intervention of Fallis.

On the other hand, Fallis is a general agent of the company; his duty as such was to disclose to the directors the material facts which had been made known to him bearing on threatened incendiarism. In this Fallis failed in his duty to his company. The question is, who is to suffer for his dual failure, the insured or

Masten, J.

1917

GABEL

v.

HOWICK
FARMERS
MUTUAL
FIRE
INSURANCE
Co.

Masten, J.

1917

GABEL

v.

HOWICK
FARMERS
MUTUAL
FIRE
INSURANCE
Co.

the company? If the question "Is incendiarism threatened or apprehended?" had been answered "No," I would have no difficulty in determining that the plaintiff Gabel was responsible for misrepresentation of a material fact, and that the company were not liable on the policy: *Kinseley v. British America Assurance Co.* (1900), 32 O.R. 376. If, on the other hand, this question had not been printed on the application, I would, for reasons hereafter stated, hold that, in the circumstances here existing, notice to such an agent as Fallis was notice to the company; but the actual situation is neither the one nor the other of these. The question appears in the application. The agent of the applicant to fill in the application omits to fill in any answer. The company, receiving the application with that omission on the face of it, do not send it back and insist on the answer being filled in, but proceed to accept the risk and issue a policy. By so accepting the risk without requiring an answer to the question, it seems to me that the directors waived that question in the printed application, and left the matter in exactly the same situation as though that question had not been printed in their form of application: *Sinclair v. Canadian Mutual Fire Insurance Co.* (1876), 40 U.C. R. 206, at p. 212.

Under such circumstances, while I hold that disclosure is essential, I think that the necessary disclosure can be effectively made *dehors* the answers in the printed form of application. Adequate disclosure was so made to an agent of the class already described. I think that was disclosure to the company, and that any provision to the contrary in the conditions or in the application is unreasonable, and therefore ineffective. It must be understood that my holding in this regard is based upon the facts of this particular case, and is not a general ruling that the last clause of this application* is under all circumstances unreasonable.† I refer to *Graham v. Ontario Mutual Insurance Co.* (1887), 14 O.R. 358.

There will be judgment for the plaintiffs for the amount of the claim, with costs.

*The usual clause as to what forms the basis of the liability of the company, and as to the agency for the applicant of the company's agent.

†Sections 195, 196, and 197 of the Insurance Act lay down rules as to the variation or omission of the statutory conditions and the addition of new conditions. By sec. 197, any such variation, omission, or addition, unless held to be just and reasonable, shall be null and void.

[MULOCK, C.J. Ex.]

1917

June 20.

LAMPEL v. BERGER.

Alien Enemy—Subject of Enemy Power Residing in Neutral Country—Trading with the “Enemy”—Contract for Sale of Land in Ontario—Validity of Contract—Disposition of Purchase-money—Intention to Transmit to Enemy Country—“Assisting” the Enemy—Criminal Code, sec. 74 (i)—Specific Performance of Contract at Suit of Purchaser—Costs—Direction to Pay Money into Court to Credit of Alien Vendor—Retention until after War—Consolidated Orders respecting Trading with the Enemy.

Upon the declaration of war it became unlawful for any resident of Canada to trade with the enemy; but, with reference to civil rights, “enemy” does not mean a person who is a subject of a nation with which His Majesty is at war, but a person, of whatever nationality, who resides or carries on business in enemy territory.

Janson v. Driefontein Consolidated Mines Limited, [1902] A.C. 484, *Porter v. Freudenberg*, [1915] 1 K.B. 857, and *Daimler Co. Limited v. Continental Tyre and Rubber Co. (Great Britain) Limited*, [1916] A.C. 307, followed.

The defendant, by birth a Hungarian, resident in the United States, and retaining his Austro-Hungarian nationality, was the owner of real property in Ontario, which, in December, 1916, he agreed to sell to the plaintiff. The defendant admitted that, if paid the purchase-money, he intended to send part of it to his wife in Hungary for the support of herself and family:—*Held*, that the agreement was not, by reason of the defendant being an alien enemy subject, invalid—he being a resident, at the time of the agreement, of a neutral country—and the plaintiff was entitled to specific performance of the agreement.

But it was the duty of the Court to prevent the defendant from “assisting” the enemy (Criminal Code, sec. 74 (i)), by impounding the purchase-money and retaining it in Court to the credit of the defendant until after the war or until further order.

A judgment for specific performance was pronounced with costs; the purchase-money, after deduction of the plaintiff’s costs, to be paid into Court.

The remedies under secs. 3 (3), 17, and 19 of the Privy Council’s Consolidated Orders respecting Trading with the Enemy, considered. ✓

An action for specific performance of a contract for the sale and purchase of land.

The action was tried by MULOCK, C.J.Ex., without a jury, at Sarnia.

M. K. Cowan, K.C., for the plaintiff.

A. I. McKinley, for the defendant.

June 20. MULOCK, C.J.Ex.:—This is an action for specific performance of a contract, bearing date the 11th day of December, 1916, whereby the defendant, owner of certain property in the city of Sarnia, in the Province of Ontario, agreed to sell the same to one Peter Glab, of that city, at the price of \$1,450.

Mulock, C.J.Ex.

1917

LAMPEL

v.

BERGER.

Peter Glab in fact purchased the property on behalf of the plaintiff, and, by instrument bearing date the 2nd day of January, 1917, assigned the contract to him.

The defendant is by birth a Hungarian. For some years he has been and still is a resident of the State of Michigan, one of the United States of America, but has retained his nationality of an Austro-Hungarian, and thus at the date of the contract sued on was an alien enemy subject, resident in neutral territory. Before completion of the contract, the plaintiff ascertained that the defendant had a wife and children resident in Hungary and was in the habit of remitting money to them; and, being in doubt as to whether he might lawfully pay over the purchase-money to the defendant, instituted this action.

The defendant by his statement of defence admits that the contract in question is valid and binding and expresses his willingness to carry it out, provided he is paid the purchase-money. He also submits that the plaintiff should not have brought this action, but that his proper course was to have invoked the provisions of sec. 19 of the Privy Council's Consolidated Orders respecting Trading with the Enemy.

The defendant on his examination for discovery stated that it was his habit to send moneys every two months to his wife in Hungary for the support of herself and family, and that he intended to send to her a portion of the purchase-money in question.

At the trial, the defendant's counsel contended that if the contract was binding the defendant was entitled to actual present payment to himself of the purchase-money; and, on my intimating that the Court might not adopt that view, but might suspend payment of the money until after the war, he argued that, if the defendant was not so entitled, then, because of the defendant being an alien enemy, the contract was void.

It appears to me that the contract may be valid, but circumstances may disentitle the defendant to payment during the war; and the first question to determine is, whether the contract entered into by the defendant was valid and binding.

The only ground for urging its invalidity is, that the defendant is by nationality an alien enemy subject. His residence and place of business are, however, in the United States, which was a neutral country at the time of the making of the contract, and now is an Ally of Great Britain.

At this date no authority is needed in support of the general proposition of law that upon the declaration of war it became unlawful for any resident of Canada to trade with "the enemy." Is the defendant, who is by nationality a Hungarian, but who, at the time of the making of the contract, and ever since, has resided and carried on business in the United States of America, an enemy in the sense that he was incapable of entering into a binding contract with a resident of Canada? I think not.

With reference to civil rights, "enemy" does not mean a person who is by nationality a subject of a nation with which His Majesty is at war, but a person, of whatever nationality, who resides or carries on business in enemy territory. Thus, a resident of Canada may trade with a person who is by birth a subject of Germany, if the latter resides in Canada or in some neutral territory, but not if he resides or carries on business in enemy territory. Thus it would be unlawful to trade with a British subject who resides or carries on business in Germany or in any other country with which His Majesty is at war. This prohibition of commercial intercourse is based on public policy, which aims at preventing trade or intercourse that by possibility may be to the advantage of the enemy or the disadvantage of His Majesty's Empire.

In *Janson v. Driefontein Consolidated Mines Limited*, [1902] A.C. 484, Lord Lindley says, at pp. 505, 506: "But when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during the war, that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts: *McConnell v. Hector* (1802), 3 B. & P. 113. Again, the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses."

In *Porter v. Freudenberg*, [1915] 1 K.B. 857, at p. 868, Lord Reading, C.J., quotes with approval this view of Lord Lindley, and states that the law prohibiting commercial intercourse with inhabitants of the enemy country is "grounded upon public

Mulock, C.J.E^x.

1917

LAMPEL

v.

BERGER.

Mulock, C.J.Ex-

1917

LAMPPEL

v.

BERGER.

policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, of other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral State carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business. . . . When considering the enforcement of civil rights a person may be treated as the subject of an enemy State, notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State."

In *Daimler Co. Limited v. Continental Tyre and Rubber Co. (Great Britain) Limited*, [1916] 2 A.C. 307, at p. 319, Lord Atkinson says: "It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and be a misdemeanour if carried on without the consent of the Crown; the reason being that the fruits of his action result to a hostile country and so furnish resources against his own country."

In the determination of the rights of the parties under the contract and assignment, the defendant, because of his residence in the United States, must be regarded, for the time being, as owing allegiance to that country, and not as being an alien enemy. Thus he was as capable of making the contract as if, in addition to such residence, he had been a citizen of the United States by birth or naturalisation. I therefore am of opinion that the contract is valid and binding, and that the plaintiff is entitled to have the same specifically performed.

As to the disposition of the purchase-money: the defendant intends to send a portion of it (how much does not appear) to his wife, who now resides in Hungary. When there, the amount remitted would become part of the financial resources of that country, and would *pro tanto* aid the enemy. The plaintiff has notice of the defendant's intention; and, were he, under the

circumstances, to enable the defendant to carry out such intention by paying to him the purchase-money, he would be contributing to the capacity of the enemy to prolong the war. This he may not do. Further, he would be violating sec. 74, clause (i), of the Criminal Code, which declares that "assisting any public enemy at war with His Majesty in such war by any means whatsoever" is treason. "Assisting," irrespective of the intent, is the test of liability.

If the plaintiff was under contract to deliver to the defendant, say, a number of rifles paid for in advance, and, before delivery, learned that the defendant intended to send them to Hungary, it would, I think, admit of no doubt that in carrying out such a contract the plaintiff would be "assisting" the enemy, and the Government would be justified in preventing such assistance by taking possession of the rifles and retaining them until the close of the war.

The same reasoning applies to the money in question, and it is the duty of the Court, which represents His Majesty, actively to intervene by impounding the money and retaining the same in Court to the credit of the defendant until after the war.

My attention was directed to clause (3) of sec. 3 of the Consolidated Orders respecting Trading with the Enemy as covering this case. But I do not think it does. That sub-section applies only where a person having control of money deals with it for the purpose of enabling the enemy to obtain it. There is no evidence that the plaintiff desires to pay the money to the defendant in order to enable the enemy to obtain it.

The defendant's counsel also contended that, under sec. 19 of the Consolidated Orders, it was competent for the Secretary of State to cancel the contract, and that the plaintiff should have moved under that section. The section applies only to a case where business is being carried on in Canada for the benefit of or under the control of enemy subjects, and where the Secretary of State has made such an order as is contemplated by sec. 17.*

*The Consolidated Orders respecting Trading with the Enemy are published in a volume compiled by the Department of the Secretary of State for Canada, and printed by the King's printer, intitled: "Third Supplement. Proclamations, Orders in Council, and Documents relating to the European War" (1917), p. 1558.

Section 2 of the Consolidated Orders provides that "any person who

Mulock, C.J.Ex.

1917

LAMP
v.
BERGER.

Mulock, C.J.Ex.

1917

LAMPEL

v.

BERGER.

It cannot be said that a shoemaker residing in the State of Michigan, who has one isolated transaction, namely, the sale of a property in Canada, is carrying on business in Canada.

Further, the Secretary of State has made no order under sec. 17.

For each of these reasons, the Secretary of State has no power to cancel the contract in question.

My judgment is, that the plaintiff is entitled to specific performance of the contract and the costs of the action. The purchase-money, after deduction of the plaintiff's costs, to be paid into Court to the credit of the defendant until after the war or until further order of the Court.

during the present war trades or attempts to trade . . . with the enemy within the meaning of these orders, shall be guilty of an offence."

Section 3 declares that certain matters set forth constitute trading with the enemy; and clause (3) is: "Dealing or attempting or offering, proposing, or agreeing, whether directly or indirectly, to deal with any money or security for money or other property which is in the hands of the person so dealing, attempting or offering, proposing, or agreeing, or over which he has any claim or control, for the purpose of enabling an enemy to obtain money or credit thereon or thereby.

Section 17 provides that where it appears to the Secretary of State that the business carried on in Canada by any person is, by reason of the enemy nationality of that person, carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Secretary of State shall make an order prohibiting the person from carrying on the business, etc.

19. Where it appears to the Secretary of State that a contract entered into before or during the war with an enemy or enemy subject or with a person . . . in respect of whose business an order shall have been made under order 17 is injurious to the public interest, the Secretary of State may by order cancel or determine such contract . . .

[APPELLATE DIVISION.]

1917

RE HARMSTON V. WOODS.

June 22.

Appeal—Motion to Extend Time for Appealing from Order of Judge of High Court Division in Chambers—Forum—Division Courts—Jurisdiction—Trespass to Land—Duty of Judge—Trial of Action—Transfer to Higher Court where Title to Land in Question—Division Courts Act, sec. 69.

The ruling of MIDDLETON, J., in *Re Harmston v. Woods* (1917), 39 O.L.R. 105, that a Division Court had no jurisdiction (sec. 62 (1) (a) of the Division Courts Act), in an action for trespass to land, having been overruled by an appellate Court, in *McConnell v. McGee* (1917), 39 O.L.R. 460, the plaintiff in the former case applied to the Appellate Division to extend the time for appealing from the order of MIDDLETON, J.—the time allowed having expired before the decision in the latter case; and it was *held*, that the application was unnecessary, at all events until after the Judge in the Division Court had been asked and had refused to try the case; and that, if it became necessary to move again, the application should be to the High Court Division.

The Judge in the Division Court should, upon having his attention called to the fact that that Court had jurisdiction, try the action if no right or title to land came in question in it; and, if it did, he should transfer the action to the Supreme Court of Ontario, under sec. 69 of the Division Courts Act.

MOTION by the plaintiff to extend the time for appealing from the order of MIDDLETON, J., 39 O.L.R. 105, dismissing an application for a mandamus to compel a County Court Judge to try the action in a Division Court.

June 6. The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. E. Lawson, for the applicant, submitted that, since the decision in *McConnell v. McGee* (1917), 39 O.L.R. 460, there is no doubt that Division Courts have jurisdiction in actions for trespass to land, where, as here, no right or title to land comes in question. No harm had been done the defendant by the delay, while it would be unjust to the plaintiff to deny him the indulgence sought.

A. E. Knox, for the defendant, did not think this was a proper case for extending the time for appealing, on account of the long delay, and referred the Court to the authorities mentioned in the judgment of MIDDLETON, J.

June 22. The judgment of the Court was read by MEREDITH, C.J.C.P.:—The plaintiff sued the defendant, in a Division Court, for damages for unlawfully entering the plaintiff's house and assaulting him.

App. Div.
1917

RE
HARMSTON

v.
WOODS.

Meredith,
C.J.C.P.

When the case came on for trial the defendant objected to the jurisdiction of the Court in so far as the action was for trespass to land, and the Judge, giving effect to the objection, "nonsuited" the plaintiff, he having declined to proceed with his action denuded of the claim for trespass to land.

The plaintiff thereupon applied to a Judge of the High Court Division of this Court, in Chambers, for a mandamus requiring the Division Court Judge to try the action as brought: but that Judge, being of opinion that Division Courts have no jurisdiction in actions for trespass to land, whether or not any question of title to land was involved, dismissed the application.

That application was made and dismissed in the month of March last.

In the following month of April, the same question was considered in this Court, in the case of *McConnell v. McGee*, 39 O.L.R. 460, and it was then held that Division Courts have jurisdiction* in actions of trespass to lands, except when some right or title to them comes in question; and the judgment of the Judge at Chambers in this case was overruled.

The time for appealing against the order made in Chambers in this case, dismissing the plaintiff's application for a mandamus, having expired before the ruling in it was overruled, the plaintiff now seeks an enlargement of the time for appealing against the order dismissing his application, so that he may have his action in the Division Court now tried; and, if that were necessary, and could be allowed here, there seems to be no good reason why it should not be done; no great length of time has elapsed, and nothing else has happened which would make it unfair to the defendant to be obliged to go to trial now; and, according to the judgment of this Court in the case of *McConnell v. McGee*, an injustice was done to the plaintiff in preventing him having his case tried in the Division Court. The shorter and better way, if any were really necessary, would be to commence a new action in the Division Court; but that is not safely open to the plaintiff, because that action might be barred by the limitation clause of the Public Authorities Protection Act, R.S.O. 1914, ch. 89, sec. 13.

But there should be no need of any appeal or motion in either Division of this Court. The Division Court Judge will doubtless,

* See sec. 62 (1) (a) of the Division Courts Act, R.S.O. 1914, ch. 63.

upon having his attention called to the fact that he has jurisdiction, and that the ruling to the contrary in this case has been overruled, try the action, if no right or title to land comes in question in it; and, if it do, will have due regard to the provisions of sec. 69 of the Division Courts Act.*

It will be time enough to make this motion after the Division Court Judge has again refused to try the case, a thing which should be very improbable.

And, should it be necessary to make again such a motion as this, it had better be made where there is power to grant it—in the High Court Division.†

No order can be made here except upon an appeal.‡

* See R.S.O. 1914, ch. 63, sec. 69, providing for the transfer to the Supreme Court of Ontario of an action in a Division Court wherein the title to land comes in question.

† See Rules 176, 492.

‡ By Rule 773 (f), made by the Supreme Court of Ontario on the 7th December, 1917, Rule 492 was amended by adding clause (6) as follows:—

(6) Notwithstanding the provisions of Rule 176, the time limited by this Rule may, either before or after its expiry, be extended only by a Judge of the Appellate Division. An application to extend time may be referred to a Divisional Court.

[APPELLATE DIVISION.]

REX v. JACKSON.

Criminal Law—Vagrancy—Common Prostitute—Police Magistrate's Conviction—Criminal Code, secs. 238 (i), 239—Form of Conviction—Description of Offence—"Satisfactory Account of himself"—Order Dismissing Application to Quash Conviction—Motion for Leave to Appeal—Right to Appeal—Rule 1287 (27th March, 1908)—Power to Make—Criminal Code, sec. 576—Habeas Corpus—Motion for Discharge of Defendant from Custody under Warrant of Commitment in Terms of Conviction—Effect of Order upon Motion to Quash—Judicature Act, sec. 32—Appeal from Order Dismissing Application to Discharge—Right of Appeal—Res Adjudicata—Arrest without Warrant—Information—Complaint—Depositions of Witnesses—Verification—Code, secs. 683, 716, 721—Jurisdiction of Magistrate—Conviction ex Facie Bad Saved by sec. 1124 of Code—Evidence to Support Conviction.

The defendant was arrested by a peace officer without a warrant, when soliciting men in a public street and taking one into an alleyway, and was brought before and summarily convicted by a police magistrate, for that she "unlawfully is a loose, idle, or disorderly person, being a common vagrant," and was "adjudged" for the "said offence to be imprisoned in the common gaol and there kept at hard labour for the term of six months."

App. Div.
1917
RE
HARMSTON
v.
WOODS.
Meredith,
C.J.C.P.

1917

March 30.
April 20.
May 2.
June 22.

1917
 REX
 v.
 JACKSON.

By sec. 239 of the Criminal Code, "every loose, idle or disorderly person or vagrant is liable on summary conviction to a fine . . . or to imprisonment." Section 238 (as amended by 5 Geo. V. ch. 12, sec. 7) names 10 classes of persons who come within the description of "a loose, idle or disorderly person or vagrant," one being, "who . . . (i) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself:"—

Held, by FALCONBRIDGE, C.J.K.B., in Chambers, refusing a motion to quash the conviction, that the conviction properly described the offence, and was sufficient under sec. 723 (3) of the Code. It was not necessary that the conviction should set out that the defendant was asked before the arrest to give an account of herself. The satisfactory account ought to be given to the magistrate.

Held, by MULOCK, C.J. Ex., in Chambers, refusing an application for leave to appeal from the order of FALCONBRIDGE, C.J.K.B., that until the peace officer asked the defendant for an explanation of her presence in the alleyway, and until her failure to give a satisfactory account of herself, she was guilty of no offence, and therefore not liable to arrest. Leave to appeal should be granted if there was a right of appeal; but there was nothing in the Criminal Code authorising an appeal, and the Ontario Legislature could not validly legislate in respect of what was an offence only under the Code. The scope of Rule 1287 and of sec. 101a (9) of the Judicature Act, R.S.O. 1897, ch. 51, as added by (1908) 8 Edw. VII. ch. 34, sec. 1, is limited to cases within the jurisdiction of the Legislature of Ontario.

The defendant, being imprisoned under a warrant of commitment issued pursuant to the conviction, obtained a writ of *habeas corpus*, and on the return moved for her discharge:—

Held, by MIDDLETON, J., in Chambers, that he was bound by the decision of FALCONBRIDGE, C.J.K.B. (Judicature Act, R.S.O. 1914, ch. 56, sec. 32 (2)); and, without expressing any independent opinion, he remanded the defendant to custody.

The defendant, under the Habeas Corpus Act, R.S.O. 1914, ch. 84, sec. 8, appealed from the decision of MIDDLETON, J., to a Divisional Court of the Appellate Division.

The appeal was dismissed—MAGEE, J.A., and CLUTE, J., dissenting.

Held, by MEREDITH, C.J.C.P., differing from MULOCK, C.J., Ex., that an appeal lay (subject to leave being granted) from the order dismissing the application to quash the conviction: the Rules of the 27th March, 1908, including Rule 1287, were within the powers conferred by sec. 576 of the Criminal Code.

Re *v. Titchmarsh* (1914), 32 O.L.R. 569, followed.

(2) If all the points taken in support of the appeal from the order of MIDDLETON, J., were open, the defendant could not succeed upon any one of them, and so it was unnecessary to consider whether they were open notwithstanding the decision upon the motion to quash the conviction.

Taking up the points in order:—

(a) There was a complaint made, and the defendant was tried upon it. When she was arrested without a warrant, she was taken to the police-station, and the charge was entered in the complaint-book; when she was brought before the magistrate, the charge was read, she pleaded, and the trial proceeded. Nothing irregular in this respect was shewn: Criminal Code, secs. 239, 706, 707, 710, 721.

(b) It was said that the evidence taken before the magistrate had not been verified as required by sec. 683 of the Code; but it was certified by a stenographer, and there was nothing to shew that he was not "a duly sworn court stenographer." And the question was not one of jurisdiction, and so was not available on the motion to discharge the prisoner: Code, secs. 716, 721.

(c) As the defendant was caught in the act of soliciting men, upon a public street, and taking at least one into an alleyway, any questioning as to, or attempt to give, a satisfactory account of herself, was out of the question; her acts gave the worst kind of an account of her wandering in the highway; and, so far as proof goes, there was quite enough to give the magistrate jurisdiction, if the arrest of the defendant, or her trial, were intended to be under sec. 238 (i) of the Code.

(d) The warrant of commitment was bad upon its face because it did not disclose any offence; and, the conviction being in like words, a new warrant would not strengthen the case against the defendant. The conviction did not describe the offence in the words of the enactment creating it—the words of the Act which made the defendant a criminal wrongdoer were the words of clause (i)—without them there was no offence. But an offence of the nature intended to be described in the warrant and conviction was committed by the defendant, an offence over which the magistrate had jurisdiction, and for which the punishment he imposed might properly be imposed by him; the warrant and conviction should be considered as “being removed by *certiorari*,” having been brought before the Court pursuant to the Rules made under sec. 576 of the Code; and so the case was brought within sec. 1124 of the Code, and the conviction and warrant should not be held invalid because of the insufficient statement of the offence.

Per RIDDELL and ROSE, JJ.:—The defendant could not succeed upon this appeal from the order of MIDDLETON, J., without shewing that the conviction under which she was imprisoned was invalid; it had been decided by a competent tribunal that the conviction was valid, and no appeal had been taken from that decision; the doctrine of *res adjudicata* applied; and this appeal must be dismissed.

Per ROSE, J.:—The offence for which a punishment is provided by sec. 239 of the Code is the offence of *being* a loose, idle, or disorderly person or vagrant, and not the offence of *doing* one or another of the things the doing of which brings the person doing it within the definition in sec. 238 of a loose, idle, or disorderly person or vagrant.

Per MAGEE, J.A.:—The conviction, while it alleged a criminal offence, described and made punishable by sec. 239 of the Code, did not describe the offence with sufficient particularity to give the accused fair knowledge of the particular facts which were alleged to bring her within that section; but that defect of form did not avoid the conviction: sec. 1124. The conviction and evidence were brought into Court as effectually as if on *certiorari* in aid of the writ of *habeas corpus*. The evidence, when examined, disclosed nothing to bring the accused under clause (i) of sec. 238, the only clause alleged to be applicable. There was no evidence of her being a common prostitute, and she was not asked by any one to give an account of herself until in the witness-box. The conviction, though still unquashed, was the only support for the warrant on which she was held, and, not being founded on evidence, both it and the warrant failed to furnish ground for holding the accused.

Per CLUTE, J.:—The accused was not asked to give an account of herself, before or at the time she was arrested, and her arrest was, therefore, illegal. (2) The conviction and warrant of commitment were bad because they disclosed no offence.

Rez v. Lamothe (1908), 18 O.L.R. 310, applied and followed.

- (3) Section 1124 of the Code did not save the conviction and commitment: a perusal of the evidence did not disclose “an offence of the nature described in the conviction, order or warrant,” because no offence was described.
- (4) The order dismissing the motion to quash, with no appeal therefrom, whether an appeal was permissible or not, was not an answer to the motion to discharge the prisoner under the writ of *habeas corpus*, if she was otherwise entitled to her discharge.

Review of the authorities.

MOTION by the defendant, Elsie Jackson, for an order quashing a magistrate's conviction for vagrancy.

March 16. The motion was heard by FALCONBRIDGE, C.J. K.B., in Chambers.

M. J. O'Reilly, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

1917

REX
v.

JACKSON.

Falconbridge,
C.J.K.B.

1917

REX

v.

JACKSON.

March 30. FALCONBRIDGE, C.J.K.B.:—Under sec. 239 of the Criminal Code, “every loose, idle or disorderly person or vagrant is liable on summary conviction to a fine . . . or to imprisonment.”

Section 238 (as amended), in 12 clauses,* names as many classes of persons who come within the category, i.e., it defines the mode of proof to establish vagrancy.

There was no information in this case—the officers thought, on the evidence of what they saw and in the exercise of their common sense, that she fell within class (i):—

“238. Every one is a loose, idle or disorderly person or vagrant who,—

“(i) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself.”

The conviction states that she “unlawfully is a loose, idle, or disorderly person, being a common vagrant.”

This follows the language of sec. 239, which creates the offence, and is a proper way of charging the offence, and is sufficient under sec. 723, sub-sec. 3: “The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law”—in an information, complaint, warrant, conviction or other proceeding under Part XV. of the Code.

Then it is objected that the officer should have interrogated her to give her the opportunity of giving “a satisfactory account of herself” under clause (i), and that the conviction should set out that she was asked before the arrest to give an account of herself.

There has been some conflict of judicial opinion on this subject, in cases not binding on me.

Rex v. Harris (1908), 13 Can. Crim. Cas. 393, and *Rex v. Pepper* (1909), 15 Can. Crim. Cas. 314, are in favour of the prisoner’s contention.

* In sec. 238 of the Criminal Code, R.S.C. 1906, ch. 146, there are 12 clauses, (a) to (l) inclusive. By the amending Act of 1915, 5 Geo. V. ch. 12, sec. 7, clauses (j) and (k) are repealed.

I would prefer the opinion of Mr. Justice Walsh in *Re Brady* (1913), 21 Can. Crim. Cas. 123, 10 D.L.R. 423.

It seems to have been assumed in these cases that the "satisfactory account of herself" is to be given to the officer. But is that the meaning of the clause? And, if so, is the officer to be the final judge of whether her account is satisfactory?

I rather incline to the belief that the satisfactory account ought to be given to the magistrate. She did give an account to him, and he evidently, and properly, did not find it to be satisfactory.

The motion is dismissed with costs.

The defendant moved for leave to appeal to a Divisional Court of the Appellate Division from the order of FALCONBRIDGE, C.J.K.B.

April 10. The motion was heard by MULLOCK, C.J.Ex., in Chambers.

T. N. Phelan, for the defendant.

The motion was not opposed.

April 20. MULLOCK, C.J.Ex.:—This is a motion for leave to appeal to the Appellate Division from the order of the Chief Justice of the King's Bench, refusing to quash a conviction.

The prisoner was arrested and convicted as being a "loose, idle, or disorderly person, being a common vagrant," within the meaning of the Criminal Code, sec. 238, clause (i).

Read together the section and clause (i) are as follows: Section 238: "Every one is a loose, idle or disorderly person or vagrant who . . . (i) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself."

The prisoner was arrested in an alleyway under circumstances which entitled the peace officer to ask her to account for her presence there; but, without asking her for an explanation, he arrested her and brought her before a magistrate, who convicted her.

The magistrate did not ask her for any explanation of her presence in the alleyway.

Falconbridge,
C.J.K.B.

1917

REX
v.

JACKSON.

Mulock, C.J.Ex.

1917

REX

v.

JACKSON.

Mr. Phelan contended that until the peace officer asked the prisoner for an explanation of her presence in the alleyway, and until her failure to give a satisfactory account of herself, she was guilty of no offence, and therefore not liable to arrest. I agree with that contention.

The point seems fully covered by the judgment of Rose, J., in the case of *Regina v. Arscott* (1885), 9 O.R. 541, and was dealt with in *Arscott v. Lilley* (1886), 11 O.R. 153. At p. 182, Wilson, C.J., who delivered the judgment of the Court, referring to the section and clause above quoted, said that they require "that these unfortunate people shall not be interfered with unless wandering in these named places; nor even then, unless they fail to give a satisfactory account of themselves; and it is quite manifest they may be able to give a very satisfactory account why they are found at the time in such places."

The learned Chief Justice (Falconbridge) took the view that the satisfactory account contemplated by the Code is to be given to the magistrate. With respect, I am unable to share that view.

A woman found wandering in the streets is not, in my opinion, to be deemed a vagrant until, on request, by the peace officer, she has failed to give him a satisfactory account of herself. Until deemed a vagrant she is not liable to be arrested as such. Were it otherwise, any woman found wandering in a public street, however honest her purpose in being there, might be arrested and detained in gaol until discharged by the magistrate. Such is not, I think, the policy of the Act.

Further, prostitutes or night walkers, like other citizens, have the right to the use of the public streets for lawful purposes. Vagrancy is a statutory offence. A prostitute, though on the public street, without more, is not a vagrant within the meaning of the Act, and therefore is not liable to arrest until after a peace officer has asked her for a satisfactory account of herself and she has failed to give it.

Entertaining these views, I would grant leave to appeal, if the Code authorised an appeal, but I find nothing there giving a right to appeal to the Appellate Division from the order of a Judge refusing to quash a summary conviction.

Mr. Phelan relies on Rule 1287.* That Rule reads as fol-

*One of the Rules made by the Judges of the Supreme Court of Judicature for Ontario on the 27th March, 1908.

lows: "An appeal shall lie from the order of the Judge to a Divisional Court if leave be granted by a Judge of the High Court."

Such is also the language of sec. 101a (9) of the Judicature Act, R.S.O. 1897, ch. 51, as added by (1908) 8 Edw. VII. ch. 34, sec. 1.

The Criminal Code not authorising an appeal, such as is here sought, the Ontario Legislature cannot do so in respect of what is an offence only under the Code. The scope of the Rule and section of the Act above quoted is limited to cases within the jurisdiction of the Legislature of Ontario, and therefore does not apply to the present case.

For these reasons the motion is refused.

The defendant obtained a writ of *habeas corpus*, and on its return moved for an order for her discharge from custody under a warrant of commitment issued pursuant to the conviction in question upon the motions above dealt with.

May 1. The motion was heard by MIDDLETON, J., in Chambers.
T. N. Phelan, for the defendant.
J. R. Cartwright, K.C., for the Crown.

May 2. MIDDLETON, J.:—In this case the Chief Justice of the King's Bench refused to quash the conviction. The Chief Justice of the Exchequer was applied to for leave to appeal. He was of opinion that there was no authority to permit an appeal, but indicated that he did not agree with the view expressed on the motion to quash. As there was no jurisdiction to entertain the motion, this opinion has no binding effect so far as I am concerned; and, on the other hand, the view acted upon by the Chief Justice of the King's Bench binds me.

A motion is now made, on the return of a *habeas corpus*, to discharge the prisoner, and I am asked to sit in review upon the decision of another Judge. This is the thing prohibited by the Judicature Act, R.S.O. 1914, ch. 56, sec. 32 (2)* and, as I under-

* 32.— . . . (2) It shall not be competent for any Judge of the High Court Division in any case before him to disregard or depart from a prior known decision of any other Judge of co-ordinate authority on any question of law or practice without his concurrence.

Mulock, C.J.Ex.

1917

REX

v.
JACKSON.

Middleton, J.

1917

REX

v.

JACKSON.

stand it, my duty is to follow the decision of the Chief Justice of the King's Bench, leaving all criticism to the Divisional Court.

Without expressing any independent opinion, I remand to custody.

The defendant appealed from the order of MIDDLETON, J.

May 11. The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., CLUTE, RIDDELL, and ROSE, JJ.

J. B. Mackenzie, for the appellant. There was no information in writing on which to base the warrant, and so the magistrate had no jurisdiction: *Smith v. Moody*, [1903] 1 K.B. 56; *Regina v. Millard* (1853), 6 Cox C.C. 150; *Regina v. Bolton* (1841), 1 Q.B. 66, at pp. 72, 73; *Rex v. Fuller* (1699), 1 Ld. Raym. 509; *Regina v. Lennox* (1873), 34 U.C.R. 28; *Campbell v. Walsh* (1910), 18 Can. Crim. Cas. 304; *Rex v. O'Connor* (1912), 3 O.W.N. 840, 20 Can. Crim. Cas. 75, 3 D.L.R. 23. There is no legal evidence, the stenographer's notes not being authenticated as required by sec. 683 of the Criminal Code: *Re Royston* (1909), 18 Man. R. 539; *Rex v. L'Heureux* (1908), 14 Can. Crim. Cas. 100; *Rex v. Johnson* (1912), 19 Can. Crim. Cas. 203, 1 D.L.R. 548. The arrest, evidently having been made under the provisions of sec. 238 (i) of the Code, was wrong, because the appellant was not asked to give, nor did she fail to give, a satisfactory account of herself: *Rex v. McCormack* (1903), 7 Can. Crim. Cas. 135; *Regina v. Levecque* (1870), 30 U.C.R. 509. The conviction should shew that she had been asked at the time of her arrest to give a satisfactory account of herself: *Rex v. Pepper*, 15 Can. Crim. Cas. 314; *Regina v. Arscott*, 9 O.R. 541; *Arscott v. Lilley*, 11 O.R. 153, 285; *Rex v. Regan* (1908), 14 Can. Crim. Cas. 106. The conviction must specify what constituted the prisoner a vagrant under the provisions of one of the clauses of sec. 238—in this case clause (i). But this it failed to do: *Rex v. Code* (1908), 13 Can. Crim. Cas. 372; *Rex v. St. Armand* (1915), 25 Can. Crim. Cas. 103; *Rex v. Lamothe* (1908), 18 O.L.R. 310. No offence under clause (i) has been proven here.

J. R. Cartwright, K.C., for the Crown. If the conviction is bad upon its face, it can be amended under the provisions of sec. 1124 of the Code: *Regina v. Murdock* (1900), 27 A.R. 443; *Rex v.*

McKenzie (1907), 12 Can. Crim. Cas. 435; *Rex v. Toy Moon* (1911), 19 Can. Crim. Cas. 33. The conviction is here, having been brought up as on *certiorari*. The stenographer's notes are sufficiently authenticated under sec. 683 of the Code: *Rex v. Leach* (1908), 17 O.L.R. 643; *Rex v. Bosak* (1916), 10 O.W.N. 301, 26 Can. Crim. Cas. 374.

Mackenzie, in reply, contended that sec. 1124 was not applicable, because neither the warrant nor the conviction was before the Court on *certiorari*. He asked for the discharge of the prisoner.

June 18. *Mackenzie*, for the defendant, moved before MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ., for leave to appeal from the order of FALCONBRIDGE, C.J.K.B., refusing the motion to quash the conviction.

The motion was not opposed.

THE COURT reserved judgment.

June 22. MEREDITH, C.J.C.P.:—There is one thing to be said about this unfortunate woman's case regarding which there should be no difference of opinion, and that is, that misfortune has followed her in her efforts to have the question of the legality or illegality of her imprisonment, at hard labour, determined in this Court. Notwithstanding all the efforts of the Legislature to make the way to this Court plain, short, and easy, she has reached this Court only after undergoing such imprisonment for now nearly four months; and then has reached it only to have it contended that this Court is powerless to give her liberty, however illegal her imprisonment might really be.

She was convicted, in summary proceedings, before a police magistrate, on the 28th day of February last, of "unlawfully" being "a loose, idle, or disorderly person, being a common vagrant," and was "adjudged" for the "said offence to be imprisoned in the common gaol and there kept at hard labour for the term of six months."

Instead of appealing against her conviction, or of seeking her discharge in *habeas corpus* proceedings, a motion was made, in her behalf, to quash the conviction. That motion was heard

App. Div.
1917
—
REX
v.
JACKSON.

App. Div.
1917
—
REX
v.
JACKSON.
—
Meredith,
C.J.C.P.

by the Chief Justice of the King's Bench, in the month of March; and was "dismissed with costs" by him on the 30th day of that month.

A motion for leave to appeal to this Court, against the order dismissing that motion, was made, and heard by the Chief Justice of the Exchequer, in the month of April, and was by him "refused" on the ground that there was no power to grant such leave in a case of conviction of a crime. The learned Chief Justice was of opinion that the conviction ought to have been quashed, and would have given leave to appeal against the order dismissing the motion to quash, if he had thought he had power to do so. His conclusion in this respect was: "Leave to appeal should be granted if there were a right of appeal."

The learned Judge's attention could not have been called to the fact that, by Rules of Court of this Province, made under sec. 576 of the Criminal Code, provisions are made for an appeal against an order made on a motion to quash, and for leave so to appeal, in criminal cases: see Rules of the 27th March, 1908: Rules which have been held to have been within the powers conferred upon the makers of them by sec. 576: see *Rex v. Titchmarsh* (1914), 32 O.L.R. 569, 22 D.L.R. 272.

Thus thwarted, *habeas corpus* proceedings were begun in the appellant's behalf; but, upon a motion made in them to discharge the prisoner, the learned Judge who heard it—Middleton, J.—considered that, under sec. 32 of the Judicature Act, he was bound to follow the judgment of the Chief Justice of the King's Bench, pronounced on the motion to quash the conviction, and that that judgment was conclusive against this motion, though it was not sought in the latter to quash, or in any way affect, the conviction.

The abbreviated note of the judgment on this motion contained in the Ontario Weekly Notes, 1917, p. 191, does not shew whether the facts: that the motion was in a criminal case; that "procedure in criminal matters" is a subject within the exclusive powers of Parliament; that the British North America Act expressly provides that "nothing in this Act shall affect the practice or procedure in criminal matters . . .;" were brought to the attention of the learned Judge.

From the order so made this appeal is brought, under the provisions of the Ontario Habeas Corpus Act, R.S.O. 1914, ch.

84, the 8th section of which provides for an appeal to this Court in a simple and speedy manner: but, as I have intimated, this unfortunate woman is now met with the contention that, though she is rightly here, the question of the legality or illegality of her imprisonment cannot be considered, that they could be considered only upon an appeal against the order dismissing the motion to quash the conviction; put in plain words: that, having been wrongly deprived of that right to appeal, she must undergo the six months' imprisonment at hard labour, whether her commitment was right or wrong.

Such a result should not be permitted, if by any proper means it can be avoided: and such a means seems to me to be plainly open to us, whether the dismissal of the motion to quash does or does not, as long as it stands, preclude the appellant more than it would if no motion to quash it had been made.

It is quite plain I think, having regard to the case of *Rex v. Titchmarsh*, that the learned Chief Justice of the Exchequer had power to grant leave to appeal on the motion made to him for such leave, and also plain that, if the motion were renewed, he should grant such leave now; so that, after more delay, we should have the whole case before us, wide open to a consideration of it upon its merits in all respects: and so, if that were necessary, I should be in favour of retaining this appeal, until the other could be regularly brought before us; but, if the conclusion must then be against the appellant, it would be useless, and an adding of additional punishment in the form of anxiety, to delay in saying so until those formalities, for such assuredly they would be, had been gone through. It would be only if the appellant could succeed eventually, but could not succeed on this appeal—a question which it is not necessary to consider—that further delay would be necessary.* And, as it seems to me that the appellant could never succeed, I feel bound to say so, and tell the reason why, now; and for that purpose to deal with all the points made in her behalf; all of which, with one exception, I may add, strike at the jurisdiction of the police magistrate in the matter, and so might have been raised in *habeas corpus* proceedings without quashing the conviction: the only reason for attacking the conviction, in the view of the case that I take, could be with a view to an action for damages against the magistrate.

App. Div.
1917
—
REX
v.
JACKSON.
—
Meredith,
C.J.C.P.

App. Div.

1917

REX

v.

JACKSON.

Meredith,
C.J.C.P.

Then, dealing with all the points made in the appellant's favour: the first, in their proper order, is: that there was no information or complaint laid or made against the woman, and that without such the police magistrate had no jurisdiction.

The answer to this point is: There was a complaint made, and the woman was tried upon that complaint. She was arrested without a warrant, and thereupon dealt with in the usual and regular manner. Upon being taken to the police-station, in such a case, the charge is entered in the complaint-book, and thereupon the prisoner is there detained and brought before the magistrate at the earliest opportunity: the charge is then read, the prisoner pleads, and the case is then tried or inquired into, and the prisoner bailed or remanded. Nothing even irregular, in this respect, has been shewn: see the Criminal Code, secs. 239, 706, 707, 710, and 721.

The second point is, that the evidence taken before the magistrate has not been verified in manner provided for in sec. 683 of the Criminal Code.

But it is certified by a stenographer, and there is nothing to shew, but the contrary is said to be the fact, that this stenographer was not "a duly sworn court stenographer." And in any case the question is not one of jurisdiction, and so is not one available on the motion to discharge the prisoner: see the Criminal Code, secs. 716 and 721.

The third point in substance is: that, if the arrest of the woman, or her trial, were intended to be under the provisions of sec. 238(i) of the Criminal Code, there was no power to arrest, nor any jurisdiction to convict, unless she failed to give a satisfactory account of herself; and that she was not asked to give, nor was there any proof of her having failed to give, a satisfactory account of herself.

The words of clause (i) are: "being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself."

The gravity of the offence is: wandering in any of the places mentioned, and not giving a satisfactory account of herself; a woman of bad character doing so.

The purpose of the law is to prevent solicitation by prostitutes, and advertising and flouting their immorality, in such open and

public places, and to curb the movements of the morally unclean, and their mixing needlessly with reputable persons. But, though a prostitute and wandering in such a place, no person comes within this clause unless she "does not give a satisfactory account of herself." It is possible that prostitutes may wander in such places for moral and proper purposes, and in disclosing such a purpose such an one may give a satisfactory account of herself: and, if such an account be given, no offence is committed; and there is no power to arrest without a warrant, or to convict in any case.

It is said that the appellant was not asked to give an account of herself before arrest or before conviction; but the clause does not expressly require that she shall be asked, though, naturally and reasonably, she would be asked, what she was doing there, if that were not evident.

However, as, in this case, the woman was caught in the act of soliciting men, upon a public street, and in taking at least one of them to a stable in an alley running into the street, for the purpose of having sexual connection with him there, any questioning as to, as well as any attempt to give, a satisfactory account of herself, was out of the question; her acts gave the worst kind of an account of her wandering in the highway. So far as proof goes, there was therefore quite enough to give the magistrate jurisdiction, to say the least of it. As one man solicited put it, though in other words, no one could mistake her purpose or character.

I now come to the last and most important point made in support of this appeal, that is: that the warrant of commitment discloses no offence, and so is *ex facie* invalid: and, it may be added, the conviction is in the like words, and so no new warrant could strengthen the case against the appellant.

The whole description of the offence is that, on the 28th day of February, 1917, Elsie Jackson unlawfully was a loose, idle, or disorderly person, being a common vagrant. Not a word is said about the real character of her offence, nor is the clause under which she was prosecuted and convicted referred to, although there formerly were 12 clauses, and now are 10, of the same section, each covering an entirely different character of offence. It is true that the section provides that: "Every one is a loose, idle or disorderly person or vagrant" who commits any of the

App. Div.
1917

REX
v.

JACKSON.

Meredith,
C.J.C.P.

App. Div.
1917

REX

v.

JACKSON.

Meredith,
C.J.C.P.

offences set out in the clauses; and that sec. 239 provides that: "every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding \$50 or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both" but the first principles of the administration of justice in criminal cases make it plain that the real offence with which a person is charged shall be set out; that there must be certainty as to the offence charged, certainty as to the offence tried, and certainty as to the offence of which the accused person is convicted or acquitted: see the Criminal Code, secs. 853, 723, 724, and 725; and how can there be any kind of certainty in a charge of being a loose, idle or disorderly person or vagrant, and when such a description, if it do not cover quite a multitude of sins, does cover 10 now, 12 formerly, of these widely different characters: no visible means of support; not maintaining family; indecent exhibitions; begging; loitering on highway; disorderly conduct; wanton disturbances; destroying property; night walker; keeping house of ill-fame; frequenting the same; and supported by prostitution.

It may be that each one of these offences may make the person committing it a loose or an idle or a disorderly person or a vagrant; but it is quite certain that some of them could not make the person committing it all four. The appellant may have been a loose person, but she could not fairly be described as an idle or disorderly person or a vagrant, and the section does not so describe her or provide that she shall be so called. The clause (i) describes her offence; and, as a loose person, sec. 239 provides for her punishment.

Under the conviction in question, for aught that appears in it, the appellant was guilty of all the 10, formerly 12, offences covered by sec. 238; for instance: indecent exhibition; begging; disorderly conduct; wanton disturbance; or destroying property: and under a plea of *autrefois acquit* or *autrefois convict* would escape after the trial of one charge, though guilty upon another or others.

But it can hardly be needful to pursue this elementary matter further; except to point out that the contention that the conviction describes the offence in the words of the enactment creating it is manifestly erroneous; the words of the Act which make the appellant a criminal wrongdoer are the words of clause (i)—

without them there is no offence: the first words of the section may give her the name of a loose person, and sec. 239 may provide for her punishment under that name, but the only description of her offence is that contained in clause (i).

The Vagrancy Act in force in England has been in force there in some form for centuries, and thousands of prosecutions and convictions have been had under it, and yet I am quite sure, though I have not now searched, that not a single instance can be found of any prosecution in the loose and vagrant form adopted in this case: and our enactment was taken from that enactment. See *Regina v. Cavanagh* (1842), 1 Dowl. N.S. 546; and *Rex v. Brown* (1798), 8 T.R. 26; and also *Rex v. Lamothe*, 18 O.L.R. 310.

The warrant of commitment therefore, in my opinion, is bad upon its face, and no kind of justification for the imprisonment of the appellant; and the conviction—apart from any question as to the effect of the dismissal of the motion to quash it—being in the same words, cannot be resorted to in aid of the imprisonment by way of a better commitment, as otherwise, the motion to quash having failed, it might be. And so, but for sec. 1124 of the Criminal Code, the appellant would escape, though really found guilty of an offence against the provisions of clause (i), and so found guilty upon evidence quite sufficient to support the conviction.

Section 1124 of the Criminal Code is in these words: “1124. No conviction or order made by any Justice, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such Justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence: Provided that the Court or Judge, where so satisfied, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section 754 conferred upon the Court to which an appeal is taken under the provisions of section 749. 2. Any statement which, under this Act or otherwise,

App. Div.

1917

REX

v.

JACKSON.

Meredith,
C.J.C.P.

App. Div.
1917

REX
v.

JACKSON.

Meredith,
C.J.C.P.

would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant." And, if applicable to this case, should defeat this application: for upon a perusal of the depositions, I cannot but be satisfied that an offence of the nature intended to be described in the warrant and conviction was committed by the appellant, such offence being one over which the magistrate had jurisdiction, and for which the punishment he imposed might properly be imposed by him; the only defect is an insufficient statement of the offence.

Full effect should be given to this salutary legislation: it was intended to prevent a guilty person escaping just punishment for an offence actually committed: to prevent such a person escaping upon any question of formality, regularity, or *sufficiency* in the conviction, order, or warrant of commitment. Is then this prisoner to escape because the warrant of commitment does not *sufficiently* describe her offence? Are we to say that an "offence of the nature described in the warrant" means regularly, formally, and sufficiently so described? The nature of the offence insufficiently described is undoubted; it is an offence under clause (i) of sec. 238. I am in favour of giving full effect to sec. 1124, and am much opposed to any attempt to thwart it.

But it is said that this section of the Act is inapplicable to this case, that it is applicable only to a conviction, order, or warrant on being removed by *certiorari*, and that neither the warrant nor conviction is before this Court on *certiorari*. That statement of fact, however, seems to me to be inaccurate. If we treat the case as here upon an appeal against the order dismissing the motion to quash the conviction, then the conviction was removed here under the Rules of Court to which I have referred; and, as I have said, this Court held in the case of *Titchmarsh* that such a removal would be by *certiorari*—that, in effect, any form of certification would be *certiorari*. The Court in that case was dealing with the word "*certiorari*" as used in sec. 576 of the Criminal Code, but the word as used there is used in the same sense as in sec. 1124. And, if the case be treated as merely a motion for the discharge of the prisoner from custody in the *habeas corpus* proceedings, these facts must be first stated: that the original conviction, and the depositions taken before the magistrate, are before us; that these papers were returned to the

High Court Division of this Court by the magistrate, under a notice, given in the appellant's behalf, requiring him so to return them, and other papers, certified by him. This notice was in accordance with the provisions of the Rules to which I have referred, as were also the return and certification of the papers. And all these papers, including the original conviction and the evidence taken upon the summary trial, are now before us, at the instance of the appellant, certified in the usual form by the proper officer of the High Court Division, and therefore may, upon the authority of the case I have mentioned, be considered as "being removed by *certiorari*;" and so the case is brought within the reasonable provisions of sec. 1124.

There was no evidence that the woman was a prostitute, except such as her misconduct immediately before and up to the time of her arrest afforded, and the fact that she had come over from Buffalo to Hamilton with no apparent purpose or object other than such her gross misconduct shewed; and without business, friends or acquaintances, there; but there was no contention before us, or in any of the proceedings, that she was not, and, if there had been, such evidence as there was would have been enough to warrant a conviction: see *Mathers v. Penfold*, [1915] 1 K.B. 514; and *Horton v. Mead*, [1912] W.N. 304; so also there was in such circumstances evidence of wandering in a public street.

As there seems to me to be no means by which the appellant can rightly escape the consequences of her flagrant misconduct, it seems to me to be proper to say so now, whether upon the appeal now before us all the points taken in her behalf can be considered or not.

Accordingly I would dismiss the appeal. Costs are not awarded in such a case.

RIDDELL, J.:—Elsie Jackson was convicted on the 1st March, 1917, before Mr. Jelfs, Police Magistrate for the City of Hamilton, for that she "unlawfully was a loose, idle, or disorderly person, being a common vagrant;" and sentenced to 6 months' imprisonment.

She applied to the Supreme Court of Ontario to quash the conviction, but failed—the Court, the learned Chief Justice of

App. Div.

1917

REX

v.

JACKSON.

Meredith,
C.J.C.P.

App. Div.
1917
—
REX
v.
JACKSON.
—
Riddell, J.

the King's Bench, deciding that the conviction was valid: *Rex v. Jackson* (1917), 12 O.W.N. 77. Leave to appeal from this decision to the Appellate Division was refused by the Chief Justice of the Exchequer (1917), 12 O.W.N. 161; the learned Chief Justice was, however, not satisfied with the decision sought to be appealed from.

She then obtained a writ of *habeas corpus*, and on the return thereof asked for her discharge: Mr. Justice Middleton refused (May 2nd, 1917), declining "to sit in review upon the decision of another Judge." The defendant now appeals.

In order that this motion may succeed, it is necessary for the defendant to shew that the conviction under which she is imprisoned is invalid—as the writ of *habeas corpus* is applicable as a remedy only in cases of wrongful deprivation of personal liberty.

A Court of competent jurisdiction was applied to by her, and that Court has decided that the conviction is valid: no appeal has been taken from that decision: and we are not sitting in appeal from it.

Whether the proceeding should be considered to be *in rem* or *in personam*, as the King and Elsie Jackson were the parties in that proceeding and in the present, I think the doctrine of *res adjudicata* applies—what is often called estoppel by matter of record.

It has been conclusively decided by a Court of competent jurisdiction, and cannot be reinvestigated here.

The cases are not directly upon this point, but I do not think authority is needed.

In re Dunn (1847), 17 L.J.N.S. C.P. 97, is not wholly unlike. It was contended for the prisoner that the warrants of commitment were bad and the judgment erroneous. Maule, J., pointed out (p. 97) that if the judgment was erroneous the prisoner was not entitled to be heard by way of *habeas corpus*.

In *Ex p. Newton* (1855), 24 L.J.N.S. C.P. 148, 16 C.B. 97, it was contended that the Court in which the conviction was had, had no jurisdiction: but the Court of Common Bench refused a writ of *habeas corpus*—even although the prisoner might have no other relief (as the Attorney-General might refuse a fiat for a writ of error *coram nobis*).

Hurd on Habeas Corpus, 2nd ed., p. 331, has a number of

cases not dissimilar—none of them, however, seems to be directly in point.

I think we cannot here and now investigate the validity of the conviction. I think that the conviction must be considered valid: and it is sufficient that the conviction is valid to require us to dismiss this appeal.

I should add that, in my opinion, the judgment of the learned Chief Justice of the King's Bench is right in all respects.

ROSE, J.:—After a great deal of hesitation, I have reached the conclusion that the offence for which a punishment is provided by sec. 239 of the Criminal Code is, as was held by the learned Chief Justice of the King's Bench, the offence of *being* a loose, idle, or disorderly person or vagrant, and not the offence of *doing* one or another of the things the doing of which brings the person doing it within the definition in sec. 238 of a loose, idle, or disorderly person or vagrant. This seems to me to be the literal meaning of the two sections referred to; and, while it is against some of the decisions cited; I do not think it is contrary to the Ontario authorities. *Regina v. Arscott*, 9 O.R. 541, was referred to. It, however, seems to me to decide no more than that a warrant of commitment for keeping a house of ill-fame which contained no allegation that the defendant did not give a satisfactory account of herself disclosed no offence: see *Arscott v. Lilley*, 11 O.R. 153, at p. 180. Moreover, in reading this case and other cases decided upon the statute 32 & 33 Vict. ch. 28, sec. 1 (Dominion), it is to be remembered that that statute differed in form from sec. 238 of the Code. It said that various persons, *inter alios*, "all common prostitutes, or night walkers wandering . . . not giving a satisfactory account of themselves" "shall be deemed vagrants, loose, idle or disorderly persons . . . and shall upon conviction . . . be deemed guilty of a misdemeanour and be punished. . . ."

I should have thought that, under that section, the offence was doing the thing which, if done, made the person doing it a loose, idle, or disorderly person, etc., and guilty of a misdemeanour, just as I think that, under the Code, the offence is being the loose, idle, or disorderly person, etc.

Rex v. Lamothe, 18 O.L.R. 310, was also referred to. In that

App. Div.
1917
REX
v.
JACKSON.
Riddell, J.

App. Div.
1917
REX
v.
JACKSON.
Rose, J.

case the conviction was for being a frequenter of a house of ill-fame, and it seems, perhaps, to have been assumed that it was proper to charge the *doing* of something mentioned in one of the clauses of sec. 238, rather than the *being* a loose, idle, or disorderly person or vagrant. But the conviction was held invalid, and the point now under discussion was not decided.

The strongest argument against the validity of a conviction for being a loose, etc., person seems to me to be one for which I am indebted to His Lordship the Chief Justice, and that is the argument based upon the requirement that the information, etc., shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Criminal Code, secs. 853 and 2 (16). But I think that argument is answerable, and that the answer is, that "the absence or insufficiency of such details shall not vitiate the count" (sec. 853), and that by following a form something like the form discussed in *Re Brady*, 21 Can. Crim. Cas. 123, 10 D.L.R. 423, it is easy to give the particulars while charging the offence in the way in which I think it ought to be charged. The form there was "for that she . . . being a common prostitute or night walker wandered in the public streets and did not give a satisfactory account of herself and is thereby a loose, idle and disorderly person and a vagrant, contrary to sec. 238 of the Criminal Code." That form was not followed here, and the warrant does not contain any details; but, as the absence of details is not to vitiate the count, I think that effect ought not to be given to the objection.

If my opinion as to the effect of secs. 238 and 239 is correct, we have a warrant, valid upon its face, following a conviction which the learned Chief Justice of the King's Bench held to be valid when it was before him upon the motion to quash. Then the question arises whether we can, upon this proceeding, go behind his judgment and inquire into the sufficiency of the evidence to support that conviction. For the reasons stated by Mr. Justice Riddell, I am of opinion that we cannot go behind that judgment. It would be an extraordinary thing if a person who applies to the Supreme Court to quash a conviction and fails because the Court comes to the conclusion that the conviction

is valid can apply to the same Court, but before other Judges, for discharge from custody and can succeed upon the ground that the conviction is invalid. It would require very clear authority to convince me that the law is such as to permit of that result. The cases relied upon by Mr. Mackenzie are the cases establishing the right of a person who fails upon an application for a writ of *habeas corpus* to renew his application before other Judges until he finds one who thinks he is entitled to the writ, *e.g.*: *Ex p. Baker* (1857), 7 E. & B. 697; *In re Baker* (1857), 2 H. & N. 219; *Cox v. Hakes* (1890), 15 App. Cas. 506. I share the doubt expressed by Harvey, C.J., in *Rex v. Thornton* (1915), 9 West. W.R. 825, 968, 30 D.L.R. 441, as to whether the practice was not subject to the limitation that the Judges should be Judges of different Courts; but, however that may be, the cases seem to me to be authorities only for what they decided, *viz.*: that no Court or Judge to which or to whom the application was made was bound to follow the judgment of another Court or Judge upon an earlier application for the same writ: of course, in Ontario, the right to make these successive applications ceased when the right of appeal was introduced: *Taylor v. Scott* (1899), 30 O.R. 475; but, apart from that fact, I think, as I have already indicated, that they are not authorities that we may reconsider the matter decided by the Chief Justice of the King's Bench unless his judgment comes regularly before us for review.

I would dismiss the appeal.

MAGEE, J.A. (dissenting):—The conviction does, I think, allege a criminal offence described and made punishable in sec. 239 of the Criminal Code—but it does not describe the offence with sufficient particularity to give the accused fair knowledge of the particular acts which are alleged to bring her within that section. That defect of form, however, does not make it void, but amendable under sec. 1124.

The accused is in prison under a warrant issued by the police magistrate under that conviction, and not under any other. An application was made to quash the conviction, but it was unsuccessful. She is still held, however, under the same warrant, not under any process from the Supreme Court. On that application the conviction and evidence on which it was founded were

App. Div.
1917
—
REX
v.
JACKSON.
—
Rose, J.

App. Div.
1917
—
REX
v.
JACKSON.
—
Magee, J.A.

brought up into this Court and are now on its files—as effectually as if on *certiorari* in aid of the writ of *habeas corpus*.

On examining the evidence, I do not find any evidence to bring the accused under clause (i) of sec. 238 of the Code, the only clause alleged to be applicable. That clause requires three facts to be proven: (1) that the accused is a common prostitute or night walker; (2) that she wanders in the fields, streets, or places of public gathering, etc.; and (3) that she does not give a satisfactory account of herself. The proof of one or two alone of these facts is not sufficient. There was here proof by the prosecution only of a single act of solicitation by the accused—no evidence whatever of her being a common prostitute. She gave evidence of having only arrived in the city the previous evening, and stated where she was living and her previous place of residence and occupation. She was not asked by any one to give any account of herself until in the witness-box. I am of opinion that the conviction was unsupported by evidence; and, though it is still unquashed, it is the only support for the warrant on which she is held, and, not being founded on evidence, both it and the warrant fail to furnish ground for holding the accused, and I think she is entitled to her discharge.

CLUTE, J. (dissenting):—Appeal from the order of Middleton, J., in Chambers, dismissing the application of Elsie Jackson for discharge from custody under a writ of *habeas corpus*.

A motion was made in the first instance to Sir Glenholme Falconbridge, C.J.K.B. (12 O.W.N. 77), to quash the conviction for vagrancy under sec. 239 of the Code.

There was no information laid in the case. The officers thought, on the evidence, that the defendant fell within clause (i) of sec. 238 of the Code, dealing with a common prostitute or night walker. The conviction stated that she “unlawfully is a loose, idle, or disorderly person, being a common vagrant.” It was objected that the officer should have interrogated the defendant or given her an opportunity to give a satisfactory account of herself under clause (i) of sec. 238, and that the conviction should set out that she was asked before the arrest to give an account of herself. The Chief Justice took the view that the satisfactory account was to be given to the magistrate. She gave no account

of herself to the magistrate, and it does not appear that she was asked, and the Chief Justice dismissed the motion to quash.

Application was made to Sir William Mulock, C.J.Ex. (12 O.W.N. 161), for leave to appeal. He took the view that the satisfactory account referred to in sec. 238 (i) of the Code was to be given to the constable, and not to the magistrate, and held that leave to appeal should be granted if there was a right of appeal. He took the view that an appeal did not lie.

A motion was then made, on the return of a *habeas corpus*, to discharge the prisoner, to Middleton, J. The learned Judge said that, being asked to sit in review upon the decision of another Judge was prohibited by the Judicature Act, sec. 32. He understood he was bound to follow the decision of the Chief Justice of the King's Bench, without expressing any independent opinion, holding that the view of the Chief Justice of the Exchequer was of no binding effect.

The warrant of commitment charges that Elsie Jackson was, on the 1st day of March, 1917, "convicted before the undersigned Police Magistrate in and for the City of Hamilton . . . and consenting and electing to his deciding upon the said charge summarily, for that the said Elsie Jackson . . . was a loose, idle, or disorderly person, being a common vagrant," and she was sentenced to six months' imprisonment in the common gaol. The conviction declares that the said Elsie Jackson on the 28th day of February, 1917, at Hamilton, "is a loose, idle, or disorderly person, being a common vagrant, and I adjudge her, the said Elsie Jackson, for her said offence, to be imprisoned in the common gaol" for the term of six months.

Section 238 (i) reads as follows: "(i) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself."

The accused was not asked to give an account of herself, before or at the time she was arrested, and, not being asked, her arrest was, in my opinion, illegal: *Regina v. Arscott*, 9 O.R. 541; *Arscott v. Lilley*, 11 O.R. 153, 182.

She was not convicted under clause (i), nor was she committed as having been convicted under that clause. The conviction and commitment use the general terms under which there are twelve classes of offences defined, and there is no intimation given in the

App. Div.
1917
Rex
v.
JACKSON.
Clute, J.

App. Div.
1917
—
REX
v.
JACKSON.
—
Clute, J.

conviction or commitment as to which class, if any, she falls under. Section 239 imposes the penalty, and uses the terms "every loose, idle or disorderly person or vagrant," used in sec. 238. I think it quite clear that an information laid in the general terms used in the conviction and commitment, without defining under what class or clause the offence falls, and charging no offence, is insufficient.

The proceedings in the Court below having been brought up by notice in lieu of *certiorari*, and a writ of *habeas corpus* having been issued, it is immaterial, in my opinion, whether there was or was not an appeal from the decision of the Chief Justice of the King's Bench refusing to quash the conviction. The sole question for decision under the writ is: Has the prisoner been illegally committed and is she now detained illegally in such circumstances as to be entitled to discharge upon this motion?

In my opinion, the case of *Rex v. Lamothe*, decided by this Court, 18 O.L.R. 310, is decisive in favour of the prisoner, unless the case falls within sec. 1124 of the Code, or unless the case is *res adjudicata* by reason of the decision of the Chief Justice of the King's Bench dismissing the motion to quash.

In *Rex v. Lamothe* the prisoner was charged with being on a specified occasion "a frequenter of a house of ill-fame," it not being stated that he was in the "habit of frequenting," under secs. 238 and 239 of the Code, or was an "habitual frequenter," under sec. 773 of the Code, and without anything appearing to shew that he was asked to give, or failed to give, a satisfactory account of himself. It was held that no offence was shewn in the conviction; and the prisoner was discharged on *habeas corpus* proceedings by order of this Court, reversing the judgment of Anglin, J., who had refused the motion for discharge and remanded the prisoner to custody. Garrow, J.A., points out (p. 314) that it was conceded that, if the conviction was made under secs. 238 and 239 of the Code, it could not be supported. It will be seen that clause (k) contains the words, as in clause (i), "does not give a satisfactory account of himself." It was contended by the Crown in that case that the conviction could be supported under sec. 773 (f) of the Code. Garrow, J.A., however, held (p. 316) that the conviction should be ascribed to secs. 238 and 239, rather than to sec. 773, and held that the conviction was bad. Moss, C.J.O.,

and Maclaren, J.A., concurred. Osler, J.A., agreed, and had nothing to add, except that the case might well have been disposed of on the authority of the decision of Armour, J., in *Regina v. Clark* (1883), 2 O.R. 523. Meredith, J.A., was also in favour of allowing the appeal, but thought that sec. 773 gave "absolute jurisdiction" to a "magistrate," in such a case as that, quite independently of sec. 238. *Rex v. Lamothe*, being a decision under the same sections of the Code as the present case, is conclusive upon this Court, unless for the reasons above indicated.

Section 1124 was in force at the date of this decision, but was not invoked or referred to in support of the conviction.

That section provides that: "No conviction or order made by any Justice, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such Justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence. . . ."

The question is: Does the perusal of the depositions disclose "an offence of the nature described in the conviction, order or warrant?" The offence, in my opinion, must be such as is recognised as a crime by the Code. It must be something definite of which the accused can be properly convicted, not a collection of offences under one general head. Bearing in mind that there was no information, and that the only words used in the conviction or commitment are, "a loose, idle, or disorderly person, being a common vagrant," it cannot, in my opinion, be said that an offence of the nature described in the conviction, order, or warrant has been committed, for the simple reason that there is no offence therein described; the words used are collective, and contain a description of what a person is who falls within the clauses from (a) to (l) inclusive. There is no offence charged. There is no offence which could be pleaded to. It is not an irregularity, informality, or insufficiency in the form of the warrant or conviction. The fact that it purports to use all the words into which the various classes of offences fall does not, in my

App. Div.
1917
—
REX
v.
JACKSON.
—
Clute, J.

App. Div.
1917
—
REX
v.
JACKSON.
—
Clute, J.

opinion, bring it within sec. 1124. There is nothing in the order of commitment or in the conviction to indicate in any way the offence of which the accused is convicted.

Nor can it be said that from the evidence it appears that the woman charged came within clause (i); and, even if she did, she was not asked to give an account of herself. I take the meaning of sec. 1124 to be, that, upon a perusal of the depositions, the Court must be satisfied that an offence of the nature described in the conviction has been committed. But there is no offence described in the conviction. How then can it be said to be of the nature of the offence described in the conviction? To say that it comes within that class begs the question, as it seems to me. There is no such offence known to the law as that described in the conviction and warrant.

As to the effect of the judgment dismissing the motion to quash, and no appeal taken, whether permissible or not, I do not think it is an answer to a motion to discharge a prisoner under a writ of *habeas corpus*, where the prisoner is otherwise entitled to the relief sought.

In Short & Mellor's Crown Practice, 2nd ed., p. 310, it is laid down that the writ lies to "obtain the discharge of prisoners from custody on commitments, whether civil or criminal, for some illegality or informality in such commitments, or for want of or excess of jurisdiction. It does not in general lie when the party is in execution of a criminal charge after judgment according to the course of common law: *Ex p. Lees* (1858), E.B. & E. 828." It is further said, p. 311, that "a warrant of commitment upon a summary conviction ought to shew a good conviction," and "the form prescribed by statute . . . should be so filled up that the description of the offence may shew jurisdiction: *Ex p. Peerless* (1841), 1 Q.B. 143; *Regina v. Chaney* (1838), 6 Dowl. 281. It is not necessary for the commitment to be so particular after conviction as before, and where there appears to be a valid conviction which is brought before the Court by the prosecutor, in support of a defective commitment, the Court will not in general discharge the prisoner for formal defects in the commitment."

I have not been able to find a case in which it was held that the dismissal of a motion to quash a conviction not appealed from renders the matter *res adjudicata*. On the contrary, I think

such a ruling would largely curtail the object of the writ. The broad ground upon which a writ issues is to prevent a person being detained illegally. It is true that the writ does not appertain to all forms of illegality. Mere errors and irregularities are not reviewable so long as they do not affect the question of jurisdiction.

The American law appears to be the same: Church on Habeas Corpus, 2nd ed., pp. 502, 503, where it is said that "neither error nor the regularity of the proceeding, so long as it does not affect the question of jurisdiction, can be reviewed on this writ. . . . This writ was never intended as a process of review by which error or irregularity in a final judgment could be considered. It deals with radical defects which go to the jurisdiction of the Court or officer, and which render the proceeding or judgment void. It is not the proper remedy where the proceeding or judgment is merely voidable." How can it be said that a magistrate may have jurisdiction which would justify a conviction where no formal charge is made and there is no conviction and no offence, and the commitment does not disclose any offence? In such case I think it clear that there is an utter want of jurisdiction, and the so-called conviction and commitment are void: Church, p. 502, note 6; *Ex p. Siebold* (1879), 100 U.S. 371.

It was there held that the appellate jurisdiction of the Supreme Court of the United States, exercisable by writ of *habeas corpus*, extended to a case of imprisonment upon conviction and commitment by an inferior Court, whether the Court had jurisdiction to review the judgment of conviction by writ of error or not. It was also held that the common law ground upon which that Court or any Court without special statutory authorisation would give relief under *habeas corpus* to a prisoner under conviction and sentence of another Court is the want of jurisdiction in such Court over the person or the cause or some other matter rendering its proceedings void. The distinction is drawn between an erroneous judgment and one that is illegal or void. Mr. Justice Bradley, at p. 375, says: "This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex p. Lange* (1873), 18 Wall. 163, and *Ex p. Parks* (1876), 93 U.S. 18. In the former case we held that that judgment was void, and released the petitioner accordingly; in the latter, we

App. Div.
1917
—
REX
v.
JACKSON.
—
Clute, J.

App. Div.
1917
—
REX
v.
JACKSON.
—
Clute, J.

held that the judgment, whether erroneous or not, was not void, because the Court had jurisdiction of the cause; and we refused to interfere."

He quotes (p. 376) Chief Justice Abbott in *Rex v. Suddis* (1801), 1 East 306, who said: "It is a general rule, that where a person has been committed under the judgment of another Court of competent criminal jurisdiction, this Court [the King's Bench] cannot review the sentence upon a return to a *habeas corpus*. In such cases this Court is not a court of appeal."

Mr. Justice Bradley then continues: "It is stated, however, in Bacon's Abridgment, probably in the words of Chief Baron Gilbert, that, 'if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the Court are to discharge;' Bac. Abr., Habeas Corpus, B. 10. The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void. The authority usually cited under this head is *Bushel's Case*, decided in 1670. There, twelve jurymen had been convicted in the oyer and terminer for rendering a verdict (against the charge of the Court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the Court of Common Pleas for a *habeas corpus*; and though the Court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose. The opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence. T. Jones 13; s.c. Vaughan 135; s.c. 6 Howell's State Trials, 999."

In *In re Coy* (1887), 127 U.S. 731, Miller, J., said (p. 758) that when it is found that the offence charged in the indictment is one of a class of offences over which the trial Court had jurisdiction, the Federal Court will not interfere. If, however, a want of jurisdiction appears on the face of the record, whether in the indictment or elsewhere, the Court is bound to discharge the accused.

The fact in the present case which deprives the Court of jurisdiction, in the form in which the conviction was made, is, that the alleged offence charged does not fall within the class of offences in respect of which the conviction is made.

In *In re Nielsen* (1888), 131 U.S. 176, it was held that where a Court is without authority to pass a particular sentence, such sentence is void, and the defendant imprisoned under it may be discharged on *habeas corpus*. Mr. Justice Bradley, who delivered the opinion of the Court, referred, on p. 183, to *Ex p. Siebold*, *supra*, and quoted from the judgment of Miller, J., in *In re Coy*, 127 U.S. at p. 758, these words: "If their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the Court which has authority to issue the writ is bound to release him."

At p. 182 of 131 U.S., Mr. Justice Bradley says: "It is firmly established that if the Court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*."

See also *People ex rel. Tweed v. Liscomb* (1875), 60 N.Y. (15 Sickels) 559, where the history of the writ of *habeas corpus* and its scope as it was introduced with the common law of the State of New York, is fully discussed. Allen, J., who gave the opinion of the Court, points out (pp. 565, 566) that "it was in use before Magna Charta, and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the State. . . . The statutes which have been passed in England from the time of Charles II. (31 Car. II. ch. 2), and in this State from the time of its first organisation, have not been intended to detract from its force, but rather to add to its efficiency." It was there held that the provision of the Habeas Corpus Act excluding from its benefits persons committed or detained by virtue of the judgment or decree of a "competent tribunal," only applies where the tribunal had jurisdiction to render the judgment under some circumstances. Jurisdiction of the person of the prisoner and of the subject-matter are not alone conclusive, but the jurisdiction of the Court to render the particular judgment is a proper subject of inquiry; and, while the Court or

App. Div.
1917
—
REX
v.
JACKSON.
—
Clute, J.

App. Div.
1917
—
REX
v.
JACKSON.
—
Clute, J.

officer cannot, upon return of the writ, go behind the judgment and inquire into alleged errors and irregularities preceding it, the question is presented and must be determined whether, upon the whole record, the judgment was warranted by law, and was within the jurisdiction of the Court. In that case, at a Court of Oyer and Terminer the relator was tried upon an indictment containing many different counts, charging separate and distinct misdemeanours, all of them of the same grade. He was found guilty under 12 of the counts, and received a separate sentence upon each, each sentence being the extreme limit of punishment prescribed by law for a single misdemeanour of the character charged. The relator having been imprisoned for the term, and having paid the fine prescribed by one sentence, applied, upon *habeas corpus*, to be discharged. Held, that the power of the Court was exhausted by one sentence, and the others were *coram non judice* and void; that the relator was not put to his writ of error to reverse or correct the judgment, but was entitled to be relieved from further imprisonment by means of the writ; and this was held, notwithstanding that it was provided by their statute (2 R.S. 563, sec. 22) that a person committed or detained by virtue of the judgment or decree of a "competent tribunal" of civil or criminal jurisdiction is expressly excluded from the benefit of the Act. In the course of the judgment, p. 571, he points out that, "if the process is valid on its face, it will be deemed *primâ facie* legal, and the prisoner must assume the burthen of impeaching its validity by shewing a want of jurisdiction. Error, irregularity, or want of form, is no objection; nor is any defect which may be amended or remedied by the Court from which it issues. If there was no legal power to render the judgment or decree, or issue the process, there was no competent Court, and consequently no judgment or process. All is *coram non judice* and void."

The case refers to many English and American authorities, indicating the extent and application of the writ.

I am clearly of opinion that neither sec. 1124 of the Code, nor the unappealed dismissal of the motion to quash, precludes this Court from giving effect to the motion to discharge the prisoner under the writ. In my opinion, the appeal should be allowed and the prisoner should be discharged.

Appeal dismissed; MAGEE, J.A., and CLUTE, J., dissenting, application for leave to appeal also dismissed.

[APPELLATE DIVISION.]

1917

June 22.

HOLLIDAY V. BANK OF HAMILTON.

Attachment of Debts—Rent of Land—Service of Attaching Order before Gale-day—Effect of Previous Attaching Order—Effect of Writ of Fi. Fa. Lands—Accrual of Rent de Die in Diem—Apportionment Act, R.S.O. 1914, ch. 156, sec. 4—Pro Ratâ Part of Rent—Assignment of Rent by Debtor—Validity—Evidence.

The defendants—having a judgment for the payment of money against R. and another—in May, 1914, placed a *fi. fa.* lands in the hands of the sheriff. R. was the owner of land which, in April, 1914, he leased to S. for three years, at a rent of \$400 per annum, payable on the 1st November, 1914, 1915, and 1916. In September, 1915, the defendants obtained an attaching order and served it upon S., who, under an order in Chambers, paid into Court the rent due on the 1st November, 1915, which was ultimately paid out to the defendants. In January, 1916, R. assigned to the plaintiff the rent due under the lease, and the plaintiff gave notice of the assignment to S. In September, 1916, the defendants obtained and served upon S. a new attaching order; the plaintiff contested the defendants' claim to the rent due on the 1st November, 1916:—

Held, that the first attaching order had no effect on the contest between the plaintiff and the defendants.

(2) That the rent was free from the operation of the *fi. fa.* lands.

(3) That the contention of the defendants that the assignment to the plaintiff was invalid, because fraudulent or preferential, failed for want of proof.

Per RIDDELL, J.:—The attaching order of September, 1916, did not attach the rent due upon the 1st November, 1916, nor even a *pro ratâ* part thereof, under the Apportionment Act, R.S.O. 1914, ch. 156, sec. 4.

Barnett v. Eastman (1898), 67 L.J.N.S.Q.B. 517, followed, in preference to *Massie v. Toronto Printing Co.* (1887), 12 P.R. 12, and other Ontario cases. Judgment of SWAYZE, Co. C.J., affirmed.

AN appeal by the defendants from the judgment of SWAYZE, Senior Judge of the County Court of the County of Victoria, finding in favour of the plaintiff an issue arising out of garnishment proceedings, after trial in that Court without a jury.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The Bank of Hamilton (the defendants) had judgment against Richman and another for \$1,451.92 and interest—May, 1914. Richman was the owner of certain land which, in April, 1914, he leased to Sheridan for three years from the 1st April, 1914, at a rental of \$400 per annum due on the 1st November, 1914, 1915, and 1916.

The bank issued a *fi. fa.* tested the 15th May, 1914, and on the 16th May placed it in the sheriff's hands. In September, 1915, the bank obtained an attaching order and served it upon

1917

HOLLIDAY
v.
BANK OF
HAMILTON.

Sheridan. On the return of the summons, the Master in Chambers made an order against the tenant in the following terms:—

"2. It is ordered that the said garnishee do on the 1st day of November, 1915, pay the said debt due from him to the said judgment debtor, amounting to \$340, into Court (after deducting therefrom his costs of this motion, fixed at \$10) to the credit of this matter.

"3. And it is further ordered that the said moneys remain in Court and abide further order and that the garnishee be discharged of and from all liability in regard to the said sum of \$340."

The money was afterwards paid out to the bank—it was of course the rent due on the 1st November, 1915, and there is no question now concerning that sum.

In January, 1916, Richman assigned the rent under the lease to Holliday, the plaintiff, who gave notice to the tenant of the assignment.

In September, 1916, the bank obtained a new attaching order, and served it. In January, 1917, the plaintiff appeared to contest the bank's claim to the rent, and an issue was directed to try the rights of the parties, the tenant having paid the rent into Court.

His Honour Judge Swayze, of the County Court of the County of Victoria, held the plaintiff entitled as against the bank, the defendants; and the defendants now appeal.

June 6. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

William Laidlaw, K. C., for the appellants, argued that overdue rent was an attachable debt, and so was bound by the execution: *Mitchell v. Lee* (1867), L. R. 2 Q. B. 259; *Tapp v. Jones* (1875), L. R. 10 Q. B. 591; Rules 590 to 594. The interests in land referred to in sec. 34 of the Execution Act, R. S. O. 1914, ch. 80, embrace rent: *Mader v. McKinnon* (1892), 21 S. G. R. 645. The assignment to Holliday was void as against creditors: *In re Cowan's Estate* (1880), 14 Ch. D. 638, at p. 643.

R. J. McLaughlin, K. C., for the plaintiff, respondent, contended that the *fi. fa.* lands did not bind the rent. The lands remained the debtor's until sale by the sheriff: *Doe d. Hughes v. Jones* (1842), 9 M. & W. 372; *Burnham v. Daly* (1854), 11 U. C. R. 211, at p. 214. While some authorities say that a *pro*

ratâ part of the rent is attachable—*Massie v. Toronto Printing Co.* (1887), 12 P.R. 12; *Kirk v. Burgess* (1888), 15 O.R. 608—the leading English authority is against this opinion: *Barnett v. Eastman* (1898), 67 L.J.N.S.Q.B. 517. See also Foa's Law of Landlord & Tenant, 3rd ed., p. 116; *Langley v. Palter* (1909), 13 O.W.R. 951; *Benallack v. Bank of British North America* (1905), 36 S.C.R. 120.

Laidlaw, in reply, referred to *McPherson v. Temiskaming Lumber Co. Limited*, [1913] A.C. 145.

June 22. RIDDELL, J. (after setting out the facts as above):—Some argument was based upon the previous attaching order: but the order of the Master in Chambers deals with the existing debt of the date of the attaching order—the previous attaching order is effete, and in my view can have no effect on the present case.

Nor does the *fi. fa.* lands have any effect as binding the rent—being an ordinary rent-seck, it is not exigible under the old statutes: *Dougall v. Turnbull* (1851), 8 U.C.R. 622; and sec. 34 of the Execution Act, R.S.O. 1914, ch. 80, introducing sec. 10 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, into the definition of "land," is not far-reaching enough to cover rent.

That being so, and the rent being free from the operation of the *fi. fa.*, there is no reason why the execution debtor should not assign it—and that is the real point in this case.

I have also considered the question, "Does the attaching order of the 16th September, 1916, attach the rent due on the 1st November following?"

That overdue rent is a debt attachable is beyond question: *Mitchell v. Lee*, L.R. 2 Q.B. 259; equally well settled is it that, before the Apportionment Act (now R.S.O. 1914, ch. 156, sec. 4), rent not yet due was not attachable: *McLaren v. Sudworth* (1858), 4 U.C.L.J.O.S. 233; *Commercial Bank v. Jarvis* (1859), 5 U.C.L.J.O.S. 66—and the question is, whether that Act has made a difference.

No decision, I think, goes further than to make the *pro ratâ* part of the rent attachable.

App. Div.
1917

HOLLIDAY
v.
BANK OF
HAMILTON.

App. Div.

1917

HOLLIDAY

v.

BANK OF
HAMILTON.

Riddell, J.

The general trend of authority in this Province is in favour of so much of the rent being attachable—this was the opinion of Mr. Dalton, Master in Chambers, and of Mr. Justice (afterwards Chief Justice Sir Thomas) Galt in *Massie v. Toronto Printing Co.*, 12 P.R. 12; of Dean, Co. C.J., in *Birmingham v. Malone* (1896), 32 C.L.J. 717; of Boyd, C., in *Patterson v. King* (1895), 27 O.R. 56; and of Ardagh, Jun. Co. C.J., in *Patterson v. Richmond* (1881), 17 C. L.J. 324 (a case in which, as here, “the garnishee has no objection to the order made, as he has submitted himself to the judgment of the Court and paid the money into Court”). On the other hand, we find Ketchum, Jun. Co. C.J. (whom Judge Dean correctly describes as a “learned and careful Judge,” 32 C.L.J. at p. 718), holding that not even a *pro ratâ* part of the rent is attachable: *Christie v. Casey* (1894), 31 C. L.J. 35: and I know of other decisions in Northumberland and Durham to the same effect.

In England it has been held that the rent (*pro ratâ*) is not attachable: *Barnett v. Eastman*, 67 L.J.N.S.Q.B. 517, by Mr. Justice Day. This decision stands alone, but it does not seem ever to have been questioned: Muir Mackenzie and Willes Chitty’s Red Book (1917), p. 702. None of the Ontario decisions is binding on us; and, unless the statutes to be interpreted are substantially different, we should follow the English decision: *Trimble v. Hill* (1879), 5 App. Cas. 342; *Catterall v. Sweetman* (1845), 9 Jur. 951.

The English Apportionment Act is (1870) 33 & 34 Vict. ch. 35; the Ontario Act, which is (1874) 37 Vict. ch. 10, is almost *totidem verbis*, and the changes suffered by it on revision are merely verbal.

The attachment considered in *Barnett v. Eastman* was under O. 45, r. 1, Rules of the Supreme Court, 1875, which is given in Snow’s Ann. Pr. for 1897, p. 856, r. 622: this gives power to the Court or a Judge to “order that all debts due or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment,” just as does our Rule 590. There is no sound distinction in the legislation or Rules: and the English decision should be followed.

I would arrive at the same result independently of authority.

I think the appeal should be dismissed with costs.

MEREDITH, C.J.C.P.:—This case is a very simple and plain one.

The issue which was directed to be tried in it was: whether on the 16th day of September, 1916, the money in question was the property of the plaintiff as against the defendants.

The money was rent due to one of two judgment debtors of the defendants: the defendants claimed it under an attaching order made on the 16th day of September, 1916, and the plaintiff claimed it under a prior assignment of it to him.

Such an assignment being proved, the defendants could succeed only if, for any reason, it was invalid as to them: and their contention was, that it was so invalid, because made with intent to defeat, delay, or hinder creditors of the assignor, or to give an unjust preference to one creditor over others: but that contention failed for the want of proof of any such intention or that the debtor was, or is, unable to pay all his just debts.

And so the judgment in appeal seems to me to have been right beyond question: and so I would dismiss this appeal: but, before parting with the case, should, perhaps, refer to some irrelevant matter which Mr. Laidlaw endeavoured to bring into it.

He sought to support the defendants' claim to the money under a similar attaching order, made in the year 1915, by means of which they recovered that year's rent: but that order was so spent and could have no effect upon the rent payable in the year 1916, to attach which the order of the 16th day of September of that year was obtained: and the sole question to be tried, in this issue, was: whether *under that order* the defendants were entitled to that year's interest.

And his last contention was, that, by reason of the defendants' *fi. fa.* lands in the sheriff's hands against the judgment debtor, the rent in question was bound, and could not be assigned: but again there is no such issue; the single issue is, whether, under the attaching order of the 16th September, 1916, he is entitled to the money in question. If the defendants deem that these *fi. fas.* bind the money, their course is to attempt to realise it under them, and not in garnishee proceedings: but how could they in such manner reach rent that is due and payable?

I am quite unable to perceive anything favourable to the appellants in the appeal, or in any of the extraneous matter brought

App. Div.
1917

HOLLIDAY
v.
BANK OF
HAMILTON.

Meredith,
C.J.C.P.

App. Div.
1917

HOLLIDAY
v.

BANK OF
HAMILTON.

Meredith,
C.J.C.P.

into it: and so unable, treating the case as if the defendants were really the appellants, and not, as it is said, one of the judgment debtors, who was a partner of the other, whose property is in question, and between whom, it is also said, no partnership accounts have been taken; and also treating it as if the judgment debtor, the rent of whose land is in question, were not fighting the battles of his country in Europe and so unable to protect his own property-interest, in person, here.

LENNOX and ROSE, JJ., agreed in the result.

Appeal dismissed with costs.

1917

[APPELLATE DIVISION.]

June 22.

LONDON ELECTRIC CO. v. ECKERT.

Contract—Sale and Purchase of Goods at Price per Pound—Absence of Written Memorandum—Estimated Weight—Sale of Definite Quantity or of all Goods of Specified Kind in Vendor's Possession—Purpose of Purchase—Absence of Warranty of Quantity—Words Written on Cheques Given in Payment—Estoppel—Claim for Damages for Shortage.

The plaintiffs had in their yard a quantity of "scrapped" copper-wire, which they estimated at about 70 tons. The defendant negotiated with the plaintiffs' manager for the purchase of the wire, and was told that it had not been weighed, but was estimated at 70 tons. A bargain of sale and purchase was made at 15 cents per lb. There was no written memorandum of the bargain. The weight turned out to be only 100,700 lbs. The defendant paid the plaintiffs a sum based upon that weight at 15 cents per lb., less a sum representing his loss of profit upon 39,300 lbs., the shortage; and the question in this action was, whether the sale was of 70 tons or of such quantity as the plaintiffs actually had in their yard. On the defendant's cheque for the first payment made on account of the price were written the words "on a/c purchase 70 tons copper." Another cheque contained the words "payment on purchase copper-wire." The defendant had the opportunity of examining the wire before purchase. The defendant was not buying for any purpose which required 70 tons or about 70 tons. The defendant took from the plaintiffs a written warranty of title to the wire, but did not ask for or receive a warranty as to quantity:—

Held, that the sale and purchase were not of 70 tons, neither more nor less, but were of all the scrapped copper-wire the plaintiffs had and were offering for sale.

The words written on the cheques simply ear-marked the transaction in which they were given, and the cashing of them did not estop the plaintiffs from shewing the truth of the matter.

Review of the authorities.

McLay and Co. v. Perry and Co. (1881), 44 L.T.R. 152, and *In re Harrison and Micks Lambert and Co.*, [1917] 1 K.B. 755, 33 Times L.R. 221, specially referred to.

Tebbitts Brothers v. Smith (1917), 33 Times L.R. 260, 508, [1917] W.N. 130, 241, explained.

APPEAL by the plaintiffs from the judgment of BOYD, C., at the trial, without a jury, at Toronto, in November, 1916, in favour of the defendant, in an action to recover \$1,277.25 as the balance of the sale-price of a quantity of copper-wire, and a counterclaim by the defendant for the same amount as damages for breach of the contract of sale, that is, for a shortage in the quantity of wire.

The plaintiffs had a quantity of "scrapped" wire in their yard, which they estimated to be about 100 tons, and they had sold 30 tons to one Grant. The defendant negotiated with Barnes, acting manager for the plaintiffs, for the purchase of the remainder, and was told by Barnes that it was estimated at about 70 tons. The price named was 15 cents per lb. The weight turned out to be only 100,700 lbs.; the defendant paid a sum based upon that weight at 15 cents per lb., less \$1,277.25, the sum now sought to be recovered, the defendant assuming to deduct that sum on account of the shortage.

The question was, whether the sale was of 70 tons or of such quantity as the plaintiffs actually had in their yard.

June 7. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

D. L. McCarthy, K.C., for the appellants, stated that the whole question to be decided was, whether the words of Barnes, when making the sale to the defendant, were words of estimate and expectation or words of contract. In other words, was the defendant entitled to have delivered to him only such quantity as the plaintiffs, at the time of the contract, actually had, or was he entitled to receive 70 tons? The former interpretation was the true one: *McLay and Co. v. Perry and Co.* (1881), 44 L.T.R. 152; *In re Harrison and Micks Lambert and Co.*, [1917] 1 K.B. 755, 33 Times L.R. 221. The learned Chancellor had virtually found that the word "approximately" was used, and the American as well as the English authorities shewed that where words like "about" or "more or less" were used, they were words of estimate, and not words of contract: *Brawley v. United States* (1877), 96 U.S. 168; *Wood v. Copper M ners' Co.* (1854), 14 C.B. 428. What the plaintiffs were selling was the pile of scrapped wire of uncertain weight which they owned.

Sir *George Gibbons*, K.C., for the defendant, respondent, argued

1917
LONDON
ELECTRIC
Co.
v.
ECKERT.

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

that the contract was for a specific amount of copper-wire, namely, 70 tons. The cheque for the first payment given, "on a/c purchase 70 tons copper," shewed this. He relied upon *Tebbitts Brothers v. Smith* (1917), 33 Times L.R. 260.

McCarthy, in reply.

June 22. LENNOX, J.:—On or about the 19th April, 1915, the plaintiffs agreed to sell the defendant a quantity of copper-wire which they had stored upon their premises in the city of London, at 15 cents per pound, the defendant to take delivery upon the plaintiffs' premises. The wire had been in use and was taken from the plaintiffs' poles a length of time before, I think about two years. It was what was called "scrapped," as being no longer serviceable in the plaintiffs' system. When it was taken down, it was estimated by the engineers and reported to the company as about 100 tons. Out of this, in February, 1915, the company sold 30 tons to a Mr. Grant. Grant told the defendant that the company had still for sale the balance of the wire taken down; and the defendant, as an intending purchaser, a few days before the 19th April, called upon Charles Barnes, the company's manager, to purchase it. There does not appear to have been any bargain made on that day, as Barnes had to get a price from his superiors, but he says the quantity was spoken of, and that he informed the defendant that they "estimated it at about 70 tons," that is, after the sale to Grant and the sale of the 30 tons to Grant was spoken of. On that day, permission was given to the defendant to inspect it. The defendant called again next day, Barnes quoted the price at 15 cents, and a bargain was come to, verbally. The defendant asked for a written guaranty or warranty that there were no liens or incumbrances upon the wire, and it was given. It is not pretended that he asked for any guaranty or warranty as to quantity. It turned out that there was only 100,700 pounds. The defendant paid the company \$13,827.75, or \$1,277.25 less than the quantity delivered at the contract-price would amount to. The company sue for this balance, and the defendant counterclaims to recover it against the company as damages for breach of contract, that is, for a shortage of 39,300 pounds at $3\frac{1}{4}$ cents per pound. The whole question is, whether the defendant, upon the contract, was entitled to have 70 tons delivered to him, or only such quantity as the company at the time of the contract actually had. The action

was tried by the late Chancellor, Sir John Boyd, without a jury, The learned Chancellor found that the sale was of an estimated or approximate quantity, that the estimate was made by the engineers, and the knowledge of the company, as stated by Mr. Barnes, and corroborated by Trudell, was founded upon the statement of the engineers. Beyond this there cannot be said to be any direct finding of fact by the trial Judge. The findings, as far as they go, discredit the defendant's own evidence and are favourable to the plaintiff company. Trudell was an undisclosed partner in the contract; he was a practical and experienced man in the handling of and dealing in copper-wire; he had known for two years that the company had this scrap, and where it had come from. He knew where it was stored, and does not deny that they were at liberty to examine and investigate as much as they liked before the purchase.

At p. 34 of the notes of evidence, upon examination by the defendant's counsel, he is asked:—

“Q. Did he (Barnes) tell you any reason why he knew the quantity that was there? A. Yes. In taking down the wire they estimated the amount, so much a mile or foot, different sizes. That is how they arrived at the amount.”

And upon cross-examination at p. 40:—

“Q. As a matter of fact, you heard what Mr. Barnes told you about the estimate which the engineers had made in taking the wire down, that they estimated it at so much a mile, or foot? A. Yes.”

It is true that both the defendant and Trudell repeat, with rather suggestive persistency, that Barnes was positive in expressing the belief that it would be found that there were about 70 tons of scrap still on hand. What if he was, and why was the matter dwelt upon? Does it not go to emphasise the truth of the plaintiffs' contention that what the company offered to sell and what the defendant agreed to buy, at a special rate per pound, was the number of coils of “scrapped wire” the plaintiffs possessed; and that the company were bound to deliver it all, whether it turned out to be just 70 tons, or more or less, and the defendant agreed to take it all, whether it was found to be 70 tons or more or less? They were talking about a specific thing, a specific collection of copper-wire upon the company's premises, of estimated, but unascertained and uncertain, weight. How did it matter what Barnes

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Lennox, J.

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Lennox, J.

thought, or why he thought it, if the company warranted a delivery of 70 tons? The defendant and his witness attempted to prove too much. The company, as incident to the business for which they were incorporated, could make a valid sale of their "scrapped wire," but had no authority to trade in wire by purchase and sale, and it ought not to be readily inferred—I will not press the argument further—that they entered into a contract they were not authorised to make. The defendant set up by his statement of defence that the contract he entered into was with the Toronto Power Company Limited, "that copper-wire *to about 70 tons* was on hand in London," and "if there was a shortage it would be made up out of the stock of the Toronto Power Company Limited in Toronto." Which is true? The instructions to the solicitors or the evidence at the trial, a warranty of 70 tons on hand in London? There was no attempt to verify the statement that it was a sale by the power company. In the case of a verbal contract such as this, what the parties said and what terms they agreed to are questions of fact: when the language they used, the surrounding circumstances, and what in terms they agreed to are ascertained, the meaning and effect of the contract is a question of law.

Taking the findings of fact of the learned Judge at the trial, as above set out, and the undisputed, or at all events the indisputable, fact that the subject-matter of the contract was the remainder of the copper-wire "scrapped" by the plaintiff company some two years before and on hand after the sale to Grant, I am, with very great respect, of opinion that the learned trial Judge erred in the principle upon which he determined the rights of the parties to this action. The two essential facts are found, namely: that the words used in referring to the quantity were, to the knowledge of the defendant, based upon an estimate, and that the quantity estimated and believed to be in stock was approximately 70 tons.

"Both conditions and warranties must be distinguished from words of expectation and estimate which do not form part of the contract at all nor give rise to any claim for damages." Halsbury's Laws of England, vol. 7, p. 521, para. 1046.

"The quantity of goods contracted for is determined by the construction of the contract. Such quantity may be specified by reference to particular circumstances or a particular standard." (For example, goods in a warehouse: *Tancred Arrol & Co. v. Steel*

Co. of Scotland Limited (1890), 15 App. Cas. 125; *Wood v. Copper Miners' Co.*, 14 C.B. 428.) "If in such a case, a specified quantity is also mentioned, with the addition of qualifying words, such as 'about,' 'more or less,' or similar words, such quantity *prima facie* represents only an anticipative estimate of quantity, and is not a term of the contract; but such an estimate may specify a minimum quantity." Halsbury's Laws of England, vol. 25, pp. 213, 214, para. 366.

"The parties may by agreement mutually take the risk of the quantity of goods being on delivery more or less than the quantity on which the price was calculated," and this even where the price fixed is a lump sum: *ib.*, p. 215, para. 368.

The case of *Tebbits Brothers v. Smith*, 33 Times L.R. 250, relied upon by Sir George Gibbons, introduces no new principle, and is an illustration only of the law laid down in Halsbury, above quoted, namely, that, notwithstanding the use of words of uncertainty such as "about," "more or less," and the like, the parties may bind themselves to a specific maximum or minimum, or both. It is a decision of Mr. Justice Ridley in the King's Bench Division, and he distinguished it from *McLay and Co. v. Perry and Co.*, 44 L.T.R. 152, and pointed out that the defendant contended for a maximum, 10 tons, beyond which he was not bound to deliver, whatever quantity there might turn out to be. The advertisement and correspondence referred to the goods as "about 8 to 10 tons," the sale-note was, "estimated 8 to 10 tons." If the expression "about" or "estimated 8 to 10 tons" meant a maximum of 10 tons, it is difficult to see why it would not also mean a minimum of 8 tons. I do not wish to be understood as saying that I would have reached the same conclusion of fact; but, assuming the facts to be correctly found, the result is plain enough.

The principle upon which *In re Harrison and Micks Lambert and Co.*, [1917] 1 K.B. 755, 33 Times L.R. 221, was decided, is the principle governing the decision of this appeal, and there, as here, the subject-matter of the contract was specific merchandise of unascertained quantity: and in both cases it was a residuary quantity, a part of the original total having been already disposed of; and in both the vendor stated only what he believed to be true. The principle is the same, but in the *Harrison* case the plaintiff was confronted by much more formidable difficulties in the way of

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Lennox, J.

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Lennox, J.

construction than the plaintiff company here. The actual quantity greatly exceeded the estimated amount, and the defendant refused to accept more than the stated number of bushels of grain, plus 5 per cent. The contract was in writing, and provided for the sale of "the remainder of the cargo (more or less about) 5,400 qr." The contract was in a form adopted by the Hull Corn Trade Association, and clause 3 stated that the word "about" would be taken to mean 5 per cent. over or under the quantity stated. Mr. Justice Bailhache said that, in his view, the buyers were bound to take the whole of the remainder of the cargo, however much it might be. The words "more or less, about 5,400 qr.," were, he thought, merely words of estimate, and the subject-matter of the contract was the sale of the whole remainder of the cargo. Mr. Justice Atkin was of the same opinion, and added: "It was true that a person buying a remainder might have no knowledge of what that remainder would amount to, but he could protect himself by inserting some words such as 'not exceeding' or 'not less than' a specified amount." *A fortiori* should this doctrine be applied where the defendant has liberty and opportunity to ascertain the quantity, and he insists upon and obtains a distinct guaranty or warranty in writing as to title but as to nothing else. There is no distinction in principle between the purchase of "a remainder" of a specific quantity and the purchase of the "entire produce," "output," or "cargo;" and to speak of the "governing word" is only another way of inquiring, "What was the subject-matter of the contract?"

In the *Harrison* case the governing word was the "remainder" of the grain, and in this case it was the "remainder" of the scrapped wire; and a cargo was the subject of contract, and "cargo" was regarded as the governing word, in *Levi and Brouse Island Guano Co. Limited v. F. W. Berk and Co.* (1886), 2 Times L.R. 898, where the sale was of "about 450 tons" of guano, the cargo loaded was only 341 tons, and the purchaser refused to accept. It was held that, in the absence of something establishing a contrary intention, the purchaser was bound to accept the cargo, whatever it might turn out to be. It is a judgment of the Court of Appeal. Lord Justice Bowen said that the words, "about 450 tons" were not an essential part of the contract, but were words of estimate.

In *Tancred Arrol & Co. v. Steel Co. of Scotland Limited*, 15 App. Cas. 125, the effect of stating an estimated quantity with the addition of the words "more or less" was very fully considered in the House of Lords, and the judgments fully support what I have already stated. It was held that, under a contract by which the contractors had undertaken to furnish the steel required for the Forth bridge—less 12,000 tons of steel plates—and in which it was stated, "The estimated quantity of steel we understand to be 30,000 tons, more or less," the contractors' right to supply the total quantity required (less the plates specifically excepted) was not qualified or affected by the estimate of "30,000 tons, more or less." At p. 135, Lord Halsbury, L.C., referring to the estimated quantity, says: "It is not the language of contract—the parties do not contract anything—it is a statement of what they understand to be the fact. If there had been anything in the nature of a contract in this language, these are not apt words to use, 'The estimated quantity of steel we understand to be 30,000 tons.' It strikes me that both the parties knew perfectly well what they were doing, and they used very fitting and proper language in order to express their meaning."

The learned trial Judge (in the present case) found that the sale was of an estimated quantity, based upon the estimate of the original quantity by the engineers, and reported as approximately 100 tons. The expression "more or less" is not said to have been used. As touching this point, Lord Halsbury said (p. 136): "I am rather disposed to agree with Sir Horace Davey that the word 'estimated' would probably have had the same operation if the words 'more or less' had not been there."

In *McLay and Co. v. Perry and Co.*, 44 L.T.R. 152, the facts were very similar to the facts in this case. It differed in this, that the first estimate of quantity was made by one S., as 150 tons, the vendors replying that there was that quantity or more. The parties contracted in reference to a quantity of old iron in the defendants' yard. As here, neither party knew the weight of it. It turned out that there were only 44 tons. As here, the defendants were not dealers in the merchandise sold. The plaintiffs sued for damages for short delivery and obtained judgment. Upon appeal it was held, that the words "about 150 tons" were merely words of estimate and expectation, and there was no warranty

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Lennox, J.

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Lennox, J.

as to quantity; that the subject-matter of the contract was not 150 tons, but the iron which S. had seen in the defendants' yard. Mr. Justice Grove (p. 153) said: "I am of opinion that the proper construction is that the words are words of mere estimate, and the verdict was wrong. It was a sale of the iron in the defendants' yard, more or less, and not 150 tons, or thereabouts." And Mr. Justice Lindley (p. 153) said: "The plaintiffs' contention is that it is an offer to buy 150 tons, more or less. It may be capable of that construction, but the subject-matter of the contract was not 150 tons, but the iron which S. had seen in the defendants' yard."

I have examined, I think, most of the English cases upon this question. Among others, *McConnel v. Murphy* (1873), L.R. 5 P.C. 203, *Power v. Barham* (1836), 4 A. & E. 473, *Leeming v. Snaith* (1851), 16 Q.B. 275 and *Gwillim v. Daniell* (1835), 2 C.M. & R. 61, may be referred to; also the American case cited by Mr. McCarthy, *Brawley v. United States*, 96 U.S. (6 Otto) 168.

The defendant relies upon the cheque of the 19th April, 1915, in which are the words, "on account purchase 70 tons copper at 15c. per lb. from London Electric Co.," which Barnes admits he read as establishing an absolute sale of 70 tons. Standing alone, it is some evidence in support of the defendant's contention. But, aside from the fact that the matter to be decided on appeal is not so much matter of fact as questions of construction and matter of law, this cheque does not stand alone. When it was issued, all parties were talking of the same thing and looked to the same result, for it was issued on the day of the agreement or the next day and before a pound of wire had been removed. At that time, in the contemplation of both parties, the estimated quantity in the yard, and "70 tons" more or less were convertible terms, meant the same thing; and it was, to my mind, as Mr. McCarthy argued, simply meant to ear-mark the transaction. When he gave the company the second cheque on the 28th April, he had ascertained that there would not be 70 tons or anything like it, and he so informed Mr. Barnes. If the defendant then, knowing and referring to this fact, and referring to it as he says, had adhered to the same wording, and it had been read and accepted in that form, he would have something to base an argument upon, he would be in a position to urge that "70 tons was my construction of the contract as well after as before the discovery of the shortage, and this is

what I always expected and insisted upon;" but he does not—he adopts a new wording in harmony with the conditions which had meantime been revealed—and this cheque is marked "Payment on purchase copper-wire." What does it denote? Does the first cheque, read with the second cheque and in the light of the shortage discovered in the meantime, help the defendant? I think it is decidedly the other way. The shortage was approximately known on or before the 28th April—it was definitely ascertained on the 8th May, when the defendant took away the last load. I in no sense rest my judgment upon this point, for it is wholly unnecessary, in my opinion, to do so; but, if it were important, I would find great difficulty in supporting the defendant's counterclaim, even if I were of opinion that he was entitled under the agreement to a delivery of specifically or about 70 tons. What he would then be entitled to would be the difference between the agreed price and the market-price at the time of the breach. When was that? At latest, the 8th May. I can find no evidence upon this point. The market-value was constantly fluctuating. There is some evidence as to the market-price at or about this time—Jacob Harris could only speak of the middle of May—very indefinite as to even that date, he says somewhere about that time is all he can speak of it. A date that might be close enough, the 10th, is referred to by Mr. McCarthy, and the price 16 cents at that time; but I need not pursue this view of the question, as I base my judgment solely upon questions independent of proof of loss.

I am of opinion that the company duly performed the contract entered into, and are entitled to recover for the quantity delivered at 15 cents per pound, less the sums paid as set out in the statement of claim, with interest on the balance. The company would be entitled to interest from the 8th May; but, as it is claimed only from the 21st June, leave it at that.

The counterclaim should be dismissed with costs, the judgment entered for the plaintiff company set aside, and judgment entered for them for \$1,277.25, with interest thereon from the 21st June, 1915, and with costs here and below.

RIDDELL and ROSE, JJ., agreed with LENNOX, J.

MEREDITH, C.J.C.P.:—If this case had to be determined upon the interested testimony adduced at the trial alone, it might be a

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Lennox, J.

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Meredith,
C.J.C.P.

case of some difficulty and one not free from doubt, whatever way it might be decided; but, fortunately for all seeking merely the truth, it seldom happens that there is no evidence other than such as depends upon interested memory: circumstantial evidence is nearly always helpful in the trying of questions of fact: and it removes all the difficulty and doubt with which this case might be beset in the absence of such evidence.

The first and main question, as the case has been argued, is: What was the subject-matter of the contract of sale in question? For the plaintiffs it is contended that it was all the worn-out and disused copper-wire which they had, and which the defendant had opportunity to see and inspect before buying: for the defendant the contention is: that it was 70 tons, neither more nor less, of such wire.

Some of the circumstances which make the true answer to this question plain, as it seems to me, are:—

The plaintiffs had for sale, to the knowledge of every one concerned, only their own worn-out, for their purposes, and dis-used, wire: it had been taken down from their transmission poles, and new wire had replaced it, about two years before: after that, what is called the insulation was burned off: and all that the plaintiffs had was the naked wire in heaps, in the shape of what is called, commonly, “scrap,” for sale: it was quite useless for any of the plaintiffs’ purposes, indeed only an incumbrance upon their property, except for what could be got for it in a sale of it as scrap electric transmission copper-wire: valuable as so much more or less pure copper-metal, which, after going through the melting pot and being converted into ingots of copper, would be worth, according to the testimony at the trial, one cent a pound more than in the scrap state.

Every one concerned knew that the wire had not been weighed, that there could not be any certainty as to its weight: but the weight of it had been calculated, it was said, by the plaintiffs’ “engineers,” when it was taken down and replaced by new wire. If the wire had been new, the weight might have been, with some degree of accuracy, calculated—estimated, it was called—if the exact length of each thickness of wire used were known, and the weight for any given length also known: but with used-up wire that was not possible: what is called the insulation—the covering

of the wire—had been worn off in part: and, according to the testimony for the defence and counterclaim, the insulation may weigh as much as 20 per cent. of the whole weight of the covered wire.

The estimation or calculation was made, as all concerned knew or were told, when the wire was taken down: and, some time after that, the insulation, all that remained, was burned off by the plaintiffs, and that which they were selling was the naked scrap copper-wire, in heaps suitable for such a sale.

Allowing 20 per cent. for loss of weight in the destruction by fire of the insulation, the calculated or estimated weight was singularly near the mark: the weight so given was about 100 tons; the shortage now complained of is a little less than 20 tons.

On the other hand, the defendant's purchase was, as he testified, purely a speculation: he bought to sell again on the chances of a rise in the price of copper. He was not buying for any kind of purpose that required 70 tons or any particular weight of such copper: the more he got the better for him if prices went up; the worse if they went down.

On neither side was there any kind of reason for certainty in weight; and neither side could have thought that there was any intention to buy or to sell neither more nor less than 70 tons. If there had been a ton more or a ton less, or 5 tons more or 5 tons less, could either party have refused to carry out the bargain? No one in his senses would, in the circumstances of the case, have bound himself to deliver exactly 70 tons, keeping in hand the over-plus, if any, or going out to buy such goods to make up the shortage, if any; nor would any buyer in his senses have expected or asked a seller to make such a contract.

Unquestionably the sale and purchase were not of 70 tons, neither more nor less, but were of all the scrap copper-wire the plaintiffs had and were then offering for sale.

But that does not dispose of the case adversely to the defendant. If there were a warranty as to quantity on the part of the sellers, and if there were a breach of that warranty, the defendant is entitled to damages. The case was not put by the defendant in this way; but, if he have such a right, there is no reason why he should not have it enforced in this action.

Assuming, however, that the plaintiffs' acting manager, who acted for them in the matter, had power to make such a warranty

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Meredith,
C.J.C.P.

App. Div.
1917

LONDON
ELECTRIC
Co.

v.
ECKERT.

Meredith,
C.J.C.P.

for the plaintiffs, why would he do so? It was not expressly asked for by the defendant, although he did take a warranty in writing in respect of another matter—a warranty of title. Every one concerned knew that the acting manager did not know—that no one knew—the weight of the wire: he told the defendant, and his adviser in the transaction and partner in the profits, how the knowledge he had as to weight had been obtained, and they both knew of the burning off of the insulation some time after the wire was taken down and the calculations as to its weight made: and this adviser and partner of the defendant was the one experienced person in regard to transactions and goods such as those in question: it was he who gave the testimony as to the proportionate weight of the insulation: and he who inspected the wire in question with the defendant before the purchase was made.

Whether the defendant could have refused to have carried out the contract on the ground that the parties were never at one as to the subject-matter of the contract; or of mutual mistake as to it; or of mistake on the part of the defendant caused by any inaccuracy in any statement made by the plaintiffs' acting manager: it seems to me to be quite clear enough, from the whole circumstances of the case, that there was no actual warranty as to quantity in addition to the written warranty as to title. Again, I feel bound to say that no man could have been insane enough to give a warranty of quantity in the circumstances of this case, and especially when there was nothing in the buyer's purposes that needed any such certainty: and that no reasonable person could have expected to get such a warranty in such a case.

The case is not at all like one in which a purchase is made of "about" a certain quantity, of which quantity the buyer has some need, out of a greater quantity which the seller has for sale.

The case was one of simply a purchase of all the copper-wire of the kind in question which the plaintiffs had for sale; the defendant knowing substantially all the circumstances in connection with the goods, and having had every opportunity he desired for seeing, inspecting, and examining them, with the assistance of his "expert" adviser and partner.

The circumstances that one cheque, given after the contract was made, in part payment of the price to be paid, contained the words "on account purchase 70 tons copper . . ." and that another cheque contained the words "payment on purchase

copper-wire," written by the defendant, have no great weight as evidence in his favour. He knew that he had not bought 70 tons exactly, and either way in which it was put in these two cheques might be near enough to the fact for the purpose of identifying the transaction on which the payments were made. Nor would the cashing of the cheques in any way estop the plaintiffs from shewing the truth of the matter. In business one does not with magnifying glasses physically or mentally examine a cheque which brings him money he is entitled to.

Nor can I see anything very forceful in the defendant's favour in all the acting manager did to see if the shortage could be made up: under all the circumstances, it was perhaps no more than any fair-minded man would have done to have enabled the purchaser to get all it was expected he would get, even though he had got all he had bargained for. And I may add that, on the conflict of testimony, the learned trial Judge did not give effect to the testimony for the defendant that the sale was of 70 tons, neither more or less, but gave effect—or intended to—to that of the acting manager that the weight mentioned was only an approximation.

The cases, in so far as they are helpful in considering such a case as this, are altogether against the defendant: see *McLay and Co. v. Perry and Co.*, 44 L.T.R. 152; *In re Harrison and Micks Lambert and Co.*, [1917] 1 K.B. 755, 33 Times L.R. 221; *Borrowman v. Drayton* (1876), 2 Ex. D. 15; and *Brawley v. United States*, 96 U.S. 168.

The case of *Tebbitts Brothers v. Smith*, 33 Times L.R. 260, [1917] W.N. 130, is really in line with these cases upon the general rule, being indeed only one of those exceptions which go to prove the rule. The learned trial Judge made an exception of it apparently because the defendant admitted that if the goods exceeded in weight the maximum amount the excess was not to pass to the purchaser: if he were right in accepting that admission as proof of what the contract really was, he was quite logical in concluding that no less than the minimum named should pass.*

I would allow the appeal.

Appeal allowed.

* It was subsequently held, by a court of appeal, that the trial Judge was wrong, and his judgment was reversed: *Tebbitts Brothers v. Smith*, [1917] W.N. 241, 33 Times L.R. 503.

1917

[CLUTE, J.]

June 25.

LINK V. THOMPSON.

Contempt of Court—Failure of Defendant to Do Act Required by Judgment—Practice—Appropriate Remedy—Writ of Attachment—Notice of Motion for Order to Commit—Personal Service—Defendant not Appearing—Power to Order Issue of Writ—Rules 545, 546, 547.

The defendant was found to be in contempt for not producing and delivering to the plaintiff the possession of a certain infant, as required by a judgment of the Court.

The notice of motion was for an order to commit the defendant, and was served upon her personally with a copy of the judgment; but she did not appear upon the return. An order was made, not for committal, but for the issue of a writ of attachment, that being deemed the more appropriate remedy.

Rules 545, 546, and 547, considered.

Review of the English authorities.

Held, that there was power to order the issue of a writ of attachment, although the notice of motion was for an order to commit.

Piper v. Piper, [1876] W.N. 202, followed.

✓
MOTION by the plaintiff to commit the defendant for contempt of Court.

June 16. The motion was heard by CLUTE, J., at the London Weekly Court.

C. G. Jarvis, for the plaintiff.

No one appeared for the defendant.

June 25. CLUTE, J.:—This was a motion to commit the defendant, Margaret Thompson, for contempt in failing to comply with the terms of the order and judgment of this Court, dated the 3rd day of May, 1917, whereby she was ordered and adjudged to appear personally before the Deputy Registrar of this Court at London, at his office in the city of London, on the 5th day after the service of the said order on the defendant, and then and there to produce Grace Jean Link (an infant), in the pleadings referred to, and then and there deliver to the plaintiff the possession of the said Grace Jean Link, in that the said defendant did not then and there produce and did not then and there deliver to the plaintiff the possession of the said Grace Jean Link.

The judgment referred to was that of Masten, J., at the trial, whereby he declared that the plaintiff is entitled to the custody of Grace Jean Link, in the pleadings mentioned, and did order and adjudge that the defendant, Margaret Thompson, appear before

the Deputy Registrar, at his Chambers in London, on the fifth day after service thereof, and then and there produce Grace Jean Link, in the pleadings referred to, and then and there deliver to the plaintiff the possession of the said Grace Jean Link.

This order and judgment was served upon her personally, the original being exhibited at the time of such service.

It appears from the certificate of the Deputy Registrar, H. S. Blackburn, dated the 29th May, 1917, that the defendant, Margaret Thompson, did appear before him at his Chambers at the day and time appointed in said order and judgment, but did not then and there produce the said Grace Jean Link, referred to in the said order and judgment; that thereupon the Deputy Registrar asked the said defendant where the said Grace Jean Link was, and in response the said defendant said, "I refuse to answer;" that he then drew her attention to the particular requirements of paragraph 3 of the order and judgment, and asked her if she understood the same; that she answered that she did; that he then asked her if she intended to disobey the said order and judgment, and she answered that she did; that he further asked her if she realised that her disobedience of the said order and judgment would probably result in her being imprisoned, and she assented.

The defendant, although duly served, did not appear upon the motion, which is made under Rule 545, which provides that a judgment requiring any person to do an act other than the payment of money, or to abstain from doing anything, may be enforced by attachment or committal.

Rule 545 corresponds with English O. 42, r. 7. The former distinction between attachment and committal is pointed out in *Harvey v. Harvey* (1884), 26 Ch. D. 644, at p. 654, where Chitty, J., says: "By Order XLII., rules 7 and 24 . . . attachment and committal are apparently placed on the same footing, and in a case of *Sprunt v. Pugh* (1878), 7 Ch. D. 567, on a motion against a receiver, in which I myself was counsel, the late Master of the Rolls (Sir G. Jessel) stated his opinion, though it does not appear in the report, that the distinction between committal for contempt and attachment for contempt was practically abolished; the difference between them seems mainly to be in the more summary process of the former and in the degree of inconvenience and expense attending it. The distinction between an order for com-

Clute, J.

1917

LINK

v.

THOMPSON.

Clut
1917
LINK
v.
THOMPSON.

mittal and an attachment for contempt was formerly considered to be, that committal was the proper remedy for doing an act prohibited by injunction or the like, whereas attachment was the remedy for neglecting to do some act ordered to be done. Committal for contempt never took place except by order of the Court."

The more recent cases shew that the former distinction in practice made between attachment and committal still obtains.

In *Mander v. Falcke*, [1891] 3 Ch. 488, Kekewich, J., refers (pp. 491, 492) to the observation of Mr. Justice Chitty, above quoted, and observes that according to the rule in that case committal is the appropriate remedy: "but I do not think it can be said that, according to the modern practice, a motion for attachment would be wrong . . . It is more important that practice should be uniform and certain than that it should be right. This is important with regard to law, but still more important with regard to practice."

In *In re Evans*, [1893] 1 Ch. 252, the question is more fully considered. In that case a defendant to an administration action was ordered to attend before the examiner. He disobeyed that order and a further order to attend at his own expense. The plaintiff moved for and obtained an order for leave to issue a writ of attachment, under which the defendant was imprisoned. It was held, both by Kekewich, J., and by the Court of Appeal, that attachment and not committal was the proper course, and that the filing of the notice of motion for attachment was sufficient without personal service. Kekewich, J., having refused to discharge the prisoner, the prisoner appealed to the Court of Appeal. Lindley, L.J., points out (p. 265) that, according to the practice of the Court of Chancery, if a man failed to obey a definite order to do an act, an attachment issued against him as a matter of course without any notice to him. This practice was altered by the Judicature Act in two respects—an attachment cannot be issued without leave of the Court or a Judge, and such leave can only be obtained on notice to the party. These alterations were embodied in O. XLIV., r. 2, which is similar to our Rule 546.* Bowen, L.J., points out (p. 266) that, the Judi-

* 546. A writ of attachment shall not be issued without the leave of the Court or a Judge, on notice to the person against whom the attachment is to be issued.

cature Act having altered the practice as to writs of attachment, the question to what extent it is altered depends upon O. XLIV., r. 2, "assuming the present case to come under the category of attachment, and not of motion to commit. The defendant was ordered to attend before an examiner. This was a proceeding in a suit to compel him to do something for the purposes of the suit . . . If a party to a suit is ordered to do anything, and he omits to do it, that is a case for attachment." A. L. Smith, L.J., said (p. 267): "In my judgment this is a proceeding rightly taken by way of attachment and not by way of committal, it being a step to compel a party to a cause to obey an order made in the cause."

There is a very instructive memorandum as to committal and attachment in a foot-note to the above case. It is there pointed out that the difference between attachment and committal before the Judicature Act was well established. A man was committed for doing what he ought not to do, and attached for not doing what he was ordered to do. It is there said that this distinction is, to a great extent, done away with by O. XLII., r. 7, similar to our Rule 545; but it is there submitted that a large class of cases yet remains unaffected by this Rule, of which instances are mentioned; and reference is made to the case of *Callow v. Young* (1887), 56 L.J. Ch. 690, where Chitty, J., directed the case to be re-argued on the point whether committal or attachment was the proper remedy for a breach of an undertaking. It is there submitted that the correct view is that these special commitments are still regulated by the old practice, under which committal rather than attachment was the absolutely correct remedy; though attachment being considered less than committal it would, under the old practice, have been open to the person aggrieved to ask for attachment rather than a committal. The distinction is still important in reference to a question as to the necessity of personal service of the notice of motion.

In *D. v. A. Co.*, [1900] 1 Ch. 484, on a motion for liberty to issue a writ of attachment against solicitors for breach of an undertaking, given by them and embodied in an order of the Court, it appeared that the order had not been served upon them:—Held, that service of the order was not necessary; but that undertakings, whether positive or negative, must be enforced by com-

Clute, J.

1917

LINK

v.

THOMPSON.

Clute, J.

1917

LINK

v.

THOMPSON.

mittal and not by attachment. Referring to *Callow v. Young*, Cozens-Hardy, J., points out (p. 488) that "in that case a motion was made before Chitty, J., . . . for leave to issue an attachment for breach of a negative undertaking, and leave was granted. It appears, however, from the Weekly Notes, *Callow v. Young*, [1886] W.N. 209, that the order was stopped on the ground that committal was the proper remedy, not attachment—a point which had not been taken in argument . . . Chitty, J., after argument, gave leave to amend the notice of motion by asking in the alternative for committal, and directed the motion to be served again. I think this amounted to a decision that, where the undertaking is in form negative, attachment is not the proper remedy . . . On principle, however, I think that except in a case falling within Order XLII., r. 7, attachment can only issue for breach of an order of the Court commanding the respondent to do a certain act, and that in the numerous cases where there is a contempt, not arising from non-compliance with such an order of the Court, the only remedy is by committal. This is the view expressed in Mr. Lavie's memorandum printed in a note to the report of *In re Evans*, [1893] 1 Ch. at p. 259, which is stated by Bowen, L.J. (*ib.* 266), to represent the practice accurately. I adopt that view, and hold that an undertaking, whether positive or negative, must be enforced by committal and not by attachment."

This is a case falling within Rule 545. Under the practice prior to the Judicature Act, it is clear that the appropriate remedy was by attachment. In my opinion, it would not be illegal, since the Judicature Act, in a case like the present, to order commitment; but it is, in my view, better practice to follow the old distinction, where attachment was the only proper remedy for disobedience of a judgment or order of the Court in refusing to do that which was ordered to be done.

This being a motion to commit, and not for a writ to issue, the question arises whether a writ of attachment may issue without re-service. In *Piper v. Piper*, [1876] W.N. 202, an application was made for a writ of attachment against a defendant in contempt who did not appear. The notice of motion was for an order to commit. It was contended that the Court might order a writ of attachment on the notice of motion. The Vice-Chancellor

held that, on the principle that the greater includes the less, he had power to order the writ to issue, and he ordered accordingly.

Following this case, and having regard to the fact that the defendant in the present case has been personally served with a notice and with a copy of the judgment, I hold that a writ of attachment may issue; and this, I think, is the proper remedy in the present case, and order the same accordingly, although an order might be made for committal. See Form 120, Holmested's Judicature Act, 4th ed., for the writ of attachment.

It is not alone from the fact that a writ of attachment issued in a case like the present under the old practice that I make the order, but also because I think it more appropriate, carrying with it, as it does, the right of the plaintiff to a writ of sequestration: Rule 547.* See also Oswald on Contempt of Court, 3rd ed., pp. 24, 30, 263; Seton's Forms of Judgments and Orders, 7th ed., vol. 1, p. 457.

The plaintiff is entitled to the costs of the motion if asked for.

* 547. Where a person is taken or detained in custody under a writ of attachment, without obeying the judgment, then upon the sheriff's return that the person has been so taken or detained, the party prosecuting the judgment shall be entitled upon motion to a writ of sequestration against the estate and effects of the disobedient person.

[APPELLATE DIVISION.]

CITY OF TORONTO v. MORSON.

Assessment and Taxes—Taxation by Municipality of "Salary" of Judge—"Income"—Powers of Provincial Legislature—Exemptions—Assessment Act, 4 Edw. VII. ch. 23, secs. 2 (8), 3, 5 (14); R.S.O. 1914, ch. 195, secs. 2 (e), 5 (15)—Omission of Word "Imperial"—"Office" of Judge.

The defendant, one of the Judges of a County Court, was held, not to be exempt from municipal taxation under Provincial legislation in respect of his salary or income as such Judge.

Abbott v. City of St. John (1908), 40 S.C.R. 597, followed.

The law as declared by the Supreme Court of Canada is the law in Canada until otherwise determined by higher authority.

The defendant was assessed for income under the Assessment Act of 1904, 4 Edw. VII. ch. 23, and the action was to recover the taxes for the years 1912 and 1914:—

Held, that the defendant was not, under the provisions of that Act, exempt from taxation in respect of his income aforesaid. Sections 2 (8) and 5 (14) considered. ✓

Clute, J.

1917

LINK

v.

THOMPSON.

1917

June 26.

1917
CITY OF
TORONTO
v.
MORSON.

Semble, if the Assessment Act, R.S.O. 1914, ch. 195, were applicable, the dropping in that Act, sec. 5, clause 15, of the word "Imperial," as used in sec. 5 (14) of the Act of 1912, in exempting "any . . . salary . . . derived by any person from His Majesty's Imperial Treasury," had no significance. ~~transferred~~

And *held*, that in sec. 2 (8) of the Act of 1904 (sec. 2 (c) of the Act R.S.O. 1914, ch. 195), the words "from a trade or commercial or financial or other business or calling" do not qualify the word "salary" as used in that clause, but only the word "profits," which immediately precedes the words quoted.

Per HODGINS, J.A., and RIDDELL, J.:—Section 3 of the Act of 1904 renders "income" liable to municipal taxation; and sec. 2 (8) defines income as including "salary . . . received by a person from any office." A County Court Judge is a "person;" his position is an "office;" and the money he receives from the Dominion is his "salary."

Judgment of MCGILLIVRAY, Co. C.J., affirmed.

AN appeal by the defendant from the judgment of MCGILLIVRAY, Co.C.J., noted 11 O.W.N. 195, in favour of the plaintiffs, the Corporation of the City of Toronto, in an action brought in the County Court of the County of Ontario, to recover the amount of municipal taxes imposed upon the defendant for the years 1912 and 1914 in respect of income enjoyed by him in those years as the emoluments of his office of a Junior Judge of the County Court of the County of York.

See *City of Toronto v. Morson* (1916), 37 O.L.R. 369.

June 20. The appeal was heard by MULOCK, C.J. Ex., HODGINS' J.A., RIDDELL, LENNOX, and ROSE, JJ.

Robert A. Reid, for the appellant. Under the British North America Act, the defendant is exempt from Provincial taxation in respect of his salary as a Judge, as he is paid out of the Consolidated Revenue Fund of Canada. Although *Abbott v. City of St. John* (1908), 40 S.C.R. 597, in effect decides that a civil or other officer of the Government of Canada may be lawfully taxed, in respect of his income as such, in the municipality in which he resides, this Court is not bound by that decision, even though it is a decision of the Supreme Court of Canada: *Macdonald v. McDonald* (1886), 11 O.R. 187. Rather this Court should follow *Leprohon v. City of Ottawa* (1878), 2 A.R. 522, in which it was held that a Provincial Legislature has no power to tax the official income of an officer of the Dominion Government, or to confer such power on municipalities. The Provincial legislation relied upon by the plaintiffs exempts the defendant from taxation of his salary or income as a Judge. A "Judge" is not a "person" within the meaning of any

part of the Act relating to the taxation of income, nor is the remuneration of the Judge "income" within the meaning of the Act. If it had been the intention to tax the remuneration of the Judges as "income," the Act would have specifically said so. The dropping of the word "Imperial" out of sec. 5, clause 14, of the Assessment Act, 4 Edw. VII. ch. 23, in the revision of the statutes, R.S.O. 1914, ch. 195, sec. 5, clause 15, shews that the Legislature did not intend to tax the salaries of Judges. Under sec. 2 (e) of the Assessment Act, R.S.O. 1914, ch. 195, a salary, to be taxable, must be derived from "a trade or commercial or financial or other business or calling;" and a Judge's remuneration does not come within any of these classes. See arguments in 33 C. L.T., p. 1143, and 34 C.L.T., p. 29.

Irving S. Fairty, for the plaintiffs, respondents, submitted that no case which required an answer had been made out for the appellant. He would not, however, ask for costs.

June 26. MULLOCK, C.J. Ex.:—This action is brought by the Corporation of the City of Toronto to recover from the defendant, one of the Junior Judges of the County of York, in the Province of Ontario, the sum of \$126.98, being municipal taxes for the years 1912 and 1914, in respect of his income as such Judge for those two years.

The case was tried by His Honour Judge McGillivray, Judge of the County Court of the County of Ontario, who gave judgment in favour of the plaintiffs, and from that judgment the defendant appeals.

The first defence is, that, by the British North America Act, 1867, the defendant is exempt from taxation under Provincial legislation in respect of his salary or income as such Judge. He was appointed by the Governor-General in Council, and is paid out of the Consolidated Revenue Fund of Canada.

The same point was raised in *Abbott v. City of St. John*, 40 S.C.R. 597, and the Supreme Court of Canada decided that a Customs officer, an appointee of the Dominion Government to the Civil Service of Canada, was taxable in respect of his salary as such Customs officer by the City of St. John, in the Province of New Brunswick, by virtue of an Act of that Province.

The defendant's counsel contended that, inasmuch as that decision may be reversed by the Judicial Committee of the Privy

App. Div.
1917

CITY OF
TORONTO
v.
MORSON.

App. Div.
1917

CITY OF
TORONTO
v.
MORSON.

Mulock, C.J.Ex.

Council, it is not binding on this Court. The law as declared by the Supreme Court of Canada is the law in Canada until otherwise determined by higher authority, and in the meantime it is binding on all lower Courts. That case in effect decided that, under Provincial legislation, every member of the Civil Service of Canada in respect of his salary as a Dominion Government official, was liable to taxation in the Province in which he resided. The question of jurisdiction thus determined being in principle the same as that raised by this appeal, and this Court being bound by *Abbott v. City of St. John*, must disallow the defendant's contention.

Another defence is, that the Provincial legislation relied upon by the plaintiffs exempts the defendant from such taxation.

The Act of the Legislature of the Province of Ontario under which the defendant was assessed in the year 1912 was 4 Edw. VII. ch. 23, intituled "An Act respecting Municipal Taxation" and known as the Assessment Act. Section 2, clause 8, of that Act, the interpretation section, defines income as follows: "'Income' shall mean the annual profit or gain or gratuity (where ascertained and capable of computation as being wages, salary or other fixed amount or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling) directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source whatever."

Section 5 enacts as follows: "All real property in this Province and all income derived either within or out of this Province by any person resident therein, or received in this Province by or on behalf of any person resident out of the same shall be liable to taxation, subject to the following exemptions, that is to say." Then follow a number of clauses describing certain exemptions, amongst them clause 14, which is as follows: "The full or half-pay of any officer, non-commissioned officer or private of His Majesty's regular Army or Navy; and any pension, salary, gratuity or stipend derived by any person from His Majesty's

Imperial Treasury, and the income of any person in such Naval or Military services, on full pay, or otherwise in actual service."

In the year 1914, there was a revision of the Statutes of Ontario, and clause 14 of sec. 5, above quoted, appears in the revision as clause 15, the only change in the wording being that the word "Imperial" is omitted from clause 15; and the defendant's counsel contends that such omission enlarged the scope of the clause so as to make it include appointees of the Canadian and also of the Imperial Government. A perusal of clause 15 shews that throughout it deals with Imperial officers only. It applies to three classes of exemptions: (a) exemptions in respect of income from the full pay or half-pay of any officer, etc., of His Majesty's regular Army or Navy; (b) exemptions in respect of income from the pension, etc., derived by any person from "His Majesty's Treasury;" (c) exemptions in respect of the income of any person "in such Naval or Military service" who is "in actual service."

Canada maintains no regular army or navy, and therefore classes (a) and (c) cannot apply to Canada. Class (b) applies only to persons whose pensions, salaries, etc., are derived from "His Majesty's Treasury." This description is never used with reference to the fund out of which payment is to be made to Canadian members of the Civil Service.

Section 4 of the Consolidated Revenue and Audit Act, being ch. 24, R.S.C. 1906, enacts as follows: "All public moneys and revenue over which the Parliament of Canada now has the power of appropriation shall form one Consolidated Revenue Fund to be appropriated for the public service of Canada," etc.

Section 27 of the Judges Act, ch. 138, R.S.C. 1906, enacts as follows: "The salaries and retiring allowances or annuities of the Judges shall be payable out of any moneys forming part of the Consolidated Revenue Fund of Canada."

Further, the annual Appropriations Act of the Parliament of Canada, in referring to the fund out of which the expenses of the public service are to be defrayed, always speaks of the fund as "the Consolidated Revenue Fund."

I therefore think that the reference in clause 15 to His Majesty's Treasury Board means the Imperial and not the Canadian Treasury.

The last defence is, that the salary of the defendant does not come within the classes of income defined by sec. 2, clause (e),

App. Div.
1917

CITY OF
TORONTO
v.
MORSON.

Mulock, C.J.Ex.

App. Div.
1917

CITY OF
TORONTO
v.
MORSON.

Mulock, C.J.Ex.

of the Assessment Act, R.S.O. 1914, ch. 195, the argument being that, according to clause (e), the salary, etc., must be one derived from "a trade or commercial or financial or other business or calling,"* which is not the defendant's case.

These words, in my opinion, qualify only the preceding word "profits."

For these reasons, I think the appeal fails, and should be dismissed (and the plaintiffs stating that they did not desire costs) without costs.

LENNOX and ROSE, JJ., concurred with MULOCK, C.J. Ex.

RIDDELL, J.:—His Honour Judge Morson, of the County Court of the County of York, being assessed upon his income as County Court Judge by the City of Toronto, refused to pay the taxes on such income for the years 1912 and 1914.

The city sued in the County Court of the County of Ontario, the Judge of that Court referred the case to the Appellate Division, and we directed him to try the case himself: 37 O.L.R. 369. He did so, and found in favour of the city—the defendant now appeals.

As was pointed out in this case on the former occasion, we sit simply *ex necessitate* (37 O.L.R. at p. 371); and I venture to hope that the main question involved may be set at rest by the Judicial Committee.

There are two and only two questions in the action:—

1. Has the Province the power to tax Judges' salaries?
2. Has it done so?

It is admitted by both counsel that the Assessment Act in force at the time of these assessments is (1904) 4 Edw. VII. ch. 23, and consequently the amendment by the omission of the word "Imperial" in R.S.O. 1914, ch. 195, sec. 5 (15), does not enter into the consideration of this case.

1. As to the power of the Province to tax such salaries, *Leprohon v. City of Ottawa*, 2 A.R. 522, decided that this power did not exist; and, had that decision stood, we should be bound to allow this appeal. But the Supreme Court of Canada, in the

*The same words are found in the Assessment Act of 1904, sec. 2 (8), quoted above.

case of *Abbott v. City of St. John*, 40 S.C.R. 597, has deprived it of all authority; and, unless we are to disregard the Supreme Court decision we must hold that the power exists.

An argument, which I should characterise as absurd but for the vigour and persistence with which it was urged, was advanced that we might disregard the judgment of the Supreme Court—this cannot be, and I say no more of it.

2. Section 3 of the Act of 1904 (4 Edw. VII. ch. 23) renders liable to municipal taxation *inter alia* "income:" and sec. 2 (8) defines "income" as including "salary . . . received by a person from any office."

A County Court Judge is a "person;" his position is an "office:" R.S.C. 1906, ch. 138, sec. 24—*cf.* British North America Act, 1867, sec. 99; and the money he receives from the Dominion is his "salary:" British North America Act, sec. 100; R.S.C. 1906, ch. 138, sec. 24; and is "the salary of the office held by him:" *ib.*, sec. 25.

The exceptions in (1904) 4 Edw. VII. ch. 23, sec. 5 (14), do not assist the appellant, but rather the reverse.

I would dismiss the appeal, but, as costs are not asked, without costs.

HODGINS, J.A., agreed with the judgment of RIDDELL, J.

Appeal dismissed without costs.

[APPELLATE DIVISION.]

LEES v. MORGAN.

Trusts and Trustees—Settlement with and Release of Trustee—Shortage in Accounts—Innocent Mistake—Ground for Setting aside Release—Absence of Fraud—Limitations Act, R.S.O. 1914, ch. 175, sec. 47—Interest of Beneficiary—Interest in Possession—Time when Statute Began to Run in Favour of Trustee.

The defendant, as executor and trustee under the will of T., who died in 1882, held one-half of T.'s estate in trust to pay the income to Mary L. during her life, and to divide the *corpus* among the children of Mary L. who should attain the age of 26 years. The plaintiff was the only child of Mary L. In 1899, the plaintiff and his mother accepted a statement made by the defendant as to the amount of their share, took over the amount, and released the defendant. Mary L. died in 1913; and, in 1915, the plaintiff commenced this action for an account, alleging that the defendant had not fully accounted, and that the plaintiff and his mother had executed the release improvidently. In the action it was found that the defendant had, by an innocent error, paid to other beneficiaries under the will moneys that formed part of the share of the plaintiff and his mother:—

App. Div.
1917

CITY OF
TORONTO

v.
MORSON.

Riddell, J.

1916

Dec. 6.

1917

July 4.

1916
LEES
v.
MORGAN.

Held, that innocent error was sufficient to invalidate the release.

In re Garnett (1885), 31 Ch.D. 1, followed.

But, it not being alleged or proved that the defendant was guilty of fraud or that he had retained or converted to his own use any of the trust property, he was entitled to the benefit of the Limitations Act, R.S.O. 1914, ch. 75, sec. 47.

Held, also, that the effect of the transaction of 1899 and of the release was to convert the plaintiff's interest in remainder into an interest in possession (sec. 47 (2) (b)); and, therefore, the statute began to run against him in 1899, and his right to recover was, at the time of the commencement of this action, barred.

AN action against a trustee for an account.

THE action was tried by LENNOX, J., without a jury, at Hamilton.

H. D. Petrie, for the plaintiff.

R. N. Ball, for the defendant Morgan.

December 6, 1916. LENNOX, J.:—After the trial was commenced, the action, so far as it affected Penmans Limited, was settled between the parties and the settlement incorporated in a sealed instrument executed by all the parties to the action. I do not feel bound or indeed at liberty to adjust the conflicting rights, if any there are, as to the moneys paid, or any other matter arising out of that settlement.

Without at all deciding that the release, or document referred to as a release, executed by the plaintiff and his mother on the 5th October, 1899, is binding to all intents and purposes, I am of opinion that there was not enough shewn to justify me, or the Master to whom certain questions were referred, in ignoring the amount acknowledged and stated by that instrument as being properly accounted for by the defendant, that is, the sum of \$18,106.41.

The Local Master at London reports to me that there are some small properties of the estate worth about \$450 yet to be disposed of. There is no reason that I can see, except expense—notwithstanding what I understood Mr. Ball to say to the contrary—why I should not direct that the whole of the accounts be gone into and the estate be administered and wound up by the Court—treating the release referred to, of course, in the way I have treated it as above mentioned—and there has been nothing shewn to satisfy me that the defendant is not legally compellable

to execute completely the trusts he undertook, if this were insisted on or thought advisable, but it is not insisted on, and I can, I think, secure the rights of the parties in another way. I shall direct that the plaintiff proceed, in a way involving no unnecessary expense, to procure offers for the purchase of these properties at the prices already ascertained by the Master as reasonable, or at about these sums or at higher prices if they can be obtained, and that the defendant and the plaintiff and other necessary parties, if any, if they can be procured to do so, join in the conveyances, with liberty reserved to the plaintiff or defendant to apply to the Court, in this action, for a further order if any difficulty should arise.

Exclusive of these properties, the total amount to be accounted for by the defendant to the plaintiff is one-half of \$43,086.04 (\$43,100.03 less \$13.99 paid for taxes) or

\$21,543.02 He has accounted for

18,106.41 as above mentioned and

2,500.00 in real estate, making a total of

\$20,606.41, leaving a balance to be accounted for and owing to the plaintiff of \$936.61. Mr. Petrie contends that it should be \$200; but, in the events which have happened, I do not see that the \$400 to be applied in the erection of a barn can affect the account; and Mr. Ball, basing his calculation on what he says was paid to the Ball and Welford branch of the family, as to which I have no evidence, makes the amount only \$697. I urged counsel to work the matter out themselves, and I am strongly of opinion they should have done so. I do not think the defendant should be compelled to pay interest; I think I must leave him to pay costs.

There will be judgment providing for the sales, as already mentioned, and for payment of \$936.61 by the defendant to the plaintiff, with costs.

The defendant Morgan appealed from the judgment of LENNOX, J.; and the plaintiff cross-appealed.

March 7. The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. D. Bissett, for the defendant, argued that, in view of the

Lennox, J.

1916

LEES

v.

MORGAN.

App. Div.
1917
—
LEES
v.
MORGAN.

great lapse of time since the agreement between the parties in 1899, and the release which was given in pursuance thereof on the 5th October in that year, and of the admitted good faith of the defendant in connection with the transactions in question, the Court should not now fix liability upon the defendant, who was only chargeable with innocent error, and had distributed the whole estate in his hands. He referred to *Skilbeck v. Hilton* (1866), L.R. 2 Eq. 586.

H. D. Petrie, for the plaintiff, argued that the judgment of the learned trial Judge was supported by the law and the facts, and should be affirmed in so far as it was in favour of the plaintiff. He referred to *Stonehouse v. Walton* (1916), 35 O.L.R. 485, 27 D.L.R. 662; *Dougan v. Macpherson*, [1902] A.C. 197; *Thomson v. Eastwood* (1877), 2 App. Cas. 215; *Godefroi on Trusts*, 4th ed., pp. 423, 424. Upon the cross-appeal it was urged that the plaintiff should have been found entitled to a larger sum.

Bissett, in reply.

July 4. The judgment of the Court was read by FERGUSON, J.A.:—This is an appeal by the defendant Morgan from a judgment pronounced by Lennox, J., dated the 6th December, 1916, whereby he directed that the plaintiff should recover against the defendant the sum of \$936.61, and that the defendant Morgan, as executor and trustee of the estate of Andrew Thompson, deceased, should convey certain lands on a sale thereof by the plaintiff, the proceeds to be paid into Court subject to further order.

The defendant is the executor and trustee of the estate of Andrew Thompson, deceased, who, by his will, dated the 10th August, 1875, among other things, devised and bequeathed one-half of his estate to the defendant, in trust to pay the income thereof to Mary Lees during her life, and to divide the corpus among the children of Mary Lees who should attain the age of 26 years. The plaintiff is the only child of Mary Lees.

On the death of Andrew Thompson, on the 2nd May, 1882, the defendant obtained letters probate of Thompson's will and entered upon the administration of the trusts thereof.

In 1899, the defendant proposed to pass his accounts, whereupon the plaintiff and his mother agreed with the defendant to

take from him an affidavit verifying the proposed accounts and to take over their share of the estate and give him a release. The circumstances are set out in the affidavit then made, which reads as follows:—

“In the matter of the Thompson estate, Port Dover.

“Whereas the undersigned L. G. Morgan is the executor of the estate of the late Andrew Thompson, of the township of Norfolk, Ontario, and whereas Mary Morgan, wife of Crosbie Morgan, and Clifford Harvey Andrew Lees, only son and heir of said Mary Morgan, being legatees of a portion of said estate, and they being desirous of taking over to themselves said portion and of discharging the undersigned and his heirs, executors, and assigns, from all obligations to them in connection with said estate, and being further desirous of avoiding the expense and publicity of submitting the books and accounts of said estate to the Surrogate Court for final adjustment and discharge, have mutually agreed to accept as correct the statement of account presented to them by the undersigned on his taking affidavit to that effect.

“I, the undersigned, therefore make oath and say that to the best of my knowledge and belief the amount of the aforesaid estate legally belonging to the aforesaid Mary Morgan and Clifford Harvey Andrew Lees is \$18,106.41, and that the whole of the said moneys has been handed over to them jointly in mortgages and cash, except two mortgages to the amount of \$450 retained by me by mutual agreement between them and me as payment of my services in connection with the Vinegar Works; and further that the usual legal deduction of 5 per cent. made to executors has not been retained by me nor other deductions to which I was legally entitled.”

On the 5th October, 1899, the plaintiff and his mother executed under seal a release, discharging the defendant from all accounting and from all demands.

Mary Lees died on or about the 19th February, 1913, and on the 4th January, 1915, the plaintiff commenced this action, alleging that the defendant had not converted all the residuary estate of Andrew Thompson, but was still in possession of certain lands in the village of Port Dover, that the defendant had failed and neglected to account to him for his share of the estate of

App. Div.
1917
LEES
v.
MORGAN.

Ferguson, J. A

App. Div.
1917

LEES
v.

MORGAN.

Ferguson, J.A.

Andrew Thompson, and that he had executed the release of October, 1899, improvidently.

After the learned trial Judge had taken some evidence, he referred the taking of further evidence and the accounts to the Local Master at Simcoe, by whom it was found that there were some lands undisposed of, and that a mistake had been made by the defendant in arriving at the amount to be paid to the plaintiff, and, in consequence of that mistake, that the defendant is charged with the sum of \$936.61.

At the time of bringing the action and up to the taking of the accounts, no person appears to have had knowledge of the mistake, and there is no doubt that the defendant did not retain the money in his possession or convert it to his own use, but many years ago (more than 6 before action) paid it over to the other beneficiaries named in the will of Andrew Thompson.

The learned Judge did not set aside the release of the 5th October, but allowed it to stand as a receipt or accounting for the amount named therein, and gave judgment for the amount that he found had been by mistake paid to the other beneficiaries. From that part of the judgment the defendant appeals, and the plaintiff cross-appeals to increase the amount from \$936.61 to \$1,136.61. Neither party appeals from the part of the judgment directing the sale of the unrealised real estate.

No fraud on the part of the executor in the procuring of the agreement, in the making of the affidavit, or in procuring the release, is alleged or proven. Innocent error is admitted. Under *In re Garnett* (1885), 31 Ch. D. 1, that, I think, is sufficient to set aside the release; but, where no fraud is alleged or proved, and it is not asserted or proven that the defendant has retained or converted to his own use any of the trust property, then I think he is entitled to have the benefit of his plea of the Statute of Limitations, R.S.O. 1914, ch. 75, sec. 47.

It is by the statute (sec. 47 (2) (b)) provided that time shall not run against a beneficiary until the interest of the beneficiary becomes an interest in possession, and it was urged on behalf of the plaintiff that his interest in the estate of Andrew Thompson did not become an interest in possession until the death of his (the plaintiff's) mother in 1913; but I am of opinion that the effect of the transaction of 1899, as indicated in the affidavit of the defendant, and of

the release of the plaintiff and his mother, was such as to convert, as it were, the plaintiff's interest in remainder into an interest in possession as of the date of those documents, and that the plaintiff might, at any time after the making of the arrangement set out in these documents, have sued the defendant for the accounting that he now sues for and for the administration of the estate, and that therefore the statute commenced to run against the plaintiff on the 5th October, 1899; and that the plaintiff's right to recover the amount in question was, at the time of the commencement of this action, barred. See *How v. Earl Winterton*, [1896] 2 Ch. 626; *In re Davies*, [1898] 2 Ch. 142; *Thorne v. Heard & Marsh*, [1895] A.C. 495, at p. 504; Halsbury's Laws of England, vol. 28, p. 201.

For these reasons, I am of opinion that the defendant's appeal should be allowed, and the plaintiff's cross-appeal, to increase the amount, dismissed.

While the defendant succeeds in both appeals, the plaintiff has in the litigation had some success; and, in the circumstances, I think justice will be done by not giving costs in this Court or in the Court below.

Judgment accordingly.

[APPELLATE DIVISION.]

MIZON V. POHORETZKY.

App. Div.
1917
—
LEES
v.
MORGAN.
—
Ferguson, J.A.

1917
—
April 19.
July 4.

Covenant—Restraint of Trade—Sale of Business including Goodwill—Undertaking of Vendor not to Carry on Business in same City—Restraint Unlimited as to Time and Wide as to Space—Reasonable Necessity for—Breach of Undertaking—Pleading—Perpetual Injunction—Damages.

The defendant, a Ruthenian grocer, sold to the plaintiff, a fellow-countryman, the stock in trade and goodwill of a grocery-business carried on in the city of Toronto. The defendant agreed not "to open store" in Toronto; but, very soon after the sale and receipt of the purchase-price, which included \$300 for the goodwill, the defendant opened a grocery-store in the neighbourhood of the store which he had sold; and to the defendant's new store customers of the old one were attracted. It was conceded that Ruthenians prefer to deal with people of their own race and usually do so:—

Held, that the protection which the restraint was designed to afford was not greater than was reasonably necessary for the protection of the plaintiff in the enjoyment of the goodwill; that there was nothing to warrant a finding that it was injurious to the public; and that the contract of the defendant was, therefore, a valid and binding one.

Judgment of LATCHFORD, J., perpetually restraining the defendant from carrying on the business of a grocery similar to that of the plaintiff, in the city of Toronto, and awarding the plaintiff \$300 damages, affirmed.

1917
 MIZON
 v.
 POHOR-
 ETZKY.

The distinction, as to the nature and extent of the restriction that may be imposed, between cases where the agreement is entered into by the vendor of a business, and cases where the agreement is entered into by an employee or servant, pointed out.

Herbert Morris Limited v. Saxelby, [1916] 1 A.C. 688, referred to.

Where the contract is *ex facie* illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule the Court will not entertain the question unless it is raised by the pleadings.

North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited, [1914] A.C. 461, referred to.

A restraint unlimited as to time is not necessarily invalid.

ACTION to restrain the defendant from carrying on the business of a grocer in the city of Toronto, in breach of a covenant, and for damages.

April 3. The action was tried by LATCHFORD, J., without a jury, at Toronto.

J. Earl Lawson, for the plaintiff.

S. Factor, for the defendant.

April 19. LATCHFORD, J.:—On the 22nd August, 1916, the defendant, a Ruthenian grocer, sold to the plaintiff, a fellow-countryman, the business which he had till then carried on at 493 Richmond street west, in the city of Toronto. The consideration was \$575 cash. A document was signed by the vendor, roughly embodying the transaction. The defendant understood quite well the purport of the document, one term of which is thus expressed: "From this date I cannot open store in Toronto." At the time, he had no intention of again doing business here. He introduced the plaintiff to his former customers and for a time assisted him in conducting the shop. He then sought to find a suitable location in Hamilton or St. Catharines, and, not succeeding, returned to Toronto, and on the 27th November opened a grocery at 579 King street west, within two or three blocks of his old place of business. The receipts of the plaintiff at once began to fall off, and he undoubtedly sustained no inconsiderable damage owing to the defendant's competition.

As soon as the writ of summons was served, the defendant executed a bill of sale of a half interest in his new business in favour of a relative. He obliterated his name from the sign painted on the window, but continued as before to manage the business.

The only question involved seems to be whether or not the protection agreed to be given the purchaser was reasonably necessary, having regard to the circumstances: Halsbury's Laws of England, vol. 27, p. 552. I have no hesitation in answering in the affirmative.

The damages sustained I estimate at \$300. There will be judgment for the plaintiff for that amount, with costs (including costs of injunction) on the High Court scale, without set-off. The injunction restraining the defendant from carrying on business as he now is, or in opposition to the plaintiff, will be made permanent.

The defendant appealed from the judgment of LATCHFORD, J.

May 31. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

P. Shulman, for the appellant, argued that the covenant was too wide, and that it was unreasonable in its terms, in view of the nature of the business: *Sir W. C. Leng & Co. Limited v. Andrews*, [1909] 1 Ch. 763, 771, 774; *Allen Manufacturing Co. v. Murphy* (1911), 23 O.L.R. 467. [MEREDITH, C.J.O., referred to *George Weston Limited v. Baird* (1916), 37 O.L.R. 514, 31 D.L.R. 730.] That case is directly in our favour. Reference was also made to *Proctor v. Sargent* (1840), 2 M. & G. 20, 33; *Hitchcock v. Coker* (1837), 6 A. & E. 438; *Eastes v. Russ*, [1914] 1 Ch. 468. The restriction was unreasonably wide in prohibiting the defendant from opening any kind of a store, a shoe-store for example, in Toronto.

J. Earl Lawson, for the plaintiff, the respondent, argued that no evidence had been given at the trial as to the covenant being too wide. "The defendant had led the plaintiff to believe that he was leaving Toronto. The law applicable to the case is the same that was laid down in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535. There is a distinction between cases in which a man restrains himself from seeking employment, and those in which, as here, a business and goodwill are sold. [HODGINS, J.A., referred to *Herbert Morris Limited v. Saxelby*, [1916] 1 A.C. 688; and MEREDITH, C.J.O., to *Skeans v. Hampton* (1914), 31 O.L.R. 424.] The question is one of the reasonableness of the restriction, in all the circumstances, and the preponderance

Latchford, J.

1917

MIZON
v.
POHOR-
ETZKY.

App. Div.

1917

MIZON

v.

POHOR-
ETZKY.

of evidence is in favour of the plaintiff. The condition has reference only to a grocery-store, and the defendant is not restrained from working or earning a livelihood.

Shulman, in reply.

July 4. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 19th April, 1917, which was directed to be entered by Latchford, J., after the trial before him sitting without a jury on the 3rd day of that month.

The respondent, on the 22nd August, 1916, purchased from the appellant the stock in trade and goodwill of a grocery-store which the appellant was carrying on at 493 Richmond street west, Toronto, and a writing intended to evidence the bargain that had been made was signed by the parties: by it the appellant agreed not "to open store in Toronto," which I take to mean, to open a grocery-store in Toronto.

Very soon after selling his business and receiving the purchase-price, which included \$300 for the goodwill, the appellant opened a grocery-store in King street, a short distance away from the premises on which he had carried on the business he had sold, and to this store customers of the Richmond street store have been attracted.

The action was brought to restrain the appellant from committing a breach of his agreement and to recover damages for the breach that has been committed, and by the judgment in appeal the appellant is perpetually restrained from "carrying on business of a grocery similar to that of the plaintiff, in the pleadings mentioned, in the city of Toronto," and the appellant has been ordered to pay \$300 as damages for the breach of the agreement of which he has been guilty.

It was contended by counsel for the appellant that the agreement of the appellant is invalid, that it is too wide both as to time and space, and that so wide a restriction upon the appellant's right to carry on business was unnecessary for the protection of the respondent in the enjoyment of the right he was intended to enjoy as the purchaser of the business and its goodwill.

The parties are Ruthenians, and it was conceded by the appellant's counsel that people of that race prefer to deal with people of their own race and usually do so. It was shewn that the local

business done at the Richmond street store was comparatively small and that it had customers at points out of Toronto. In other respects the evidence was meagre. There was nothing to shew the number of Ruthenians who dwell in Toronto or whether they are scattered over the city or live in particular districts.

There is a marked distinction, as to the nature and the extent of the restriction that may be imposed, between cases such as this, where the agreement is entered into by the vendor of a business, and cases where the agreement is entered into by an employee or servant, the limit of the restriction that may be imposed in the latter class of case being much narrower than in the former: *Herbert Morris Limited v. Saxelby*, [1916] 1 A.C. 688.

The law applicable in the latter class of case has been considered recently by a Divisional Court in *George Weston Limited v. Baird*, 37 O.L.R. 514, 31 D.L.R. 730, where many of the cases are referred to and discussed.

Dealing with cases of the class first mentioned Lord Atkinson said in *Herbert Morris Limited v. Saxelby*: "These considerations in themselves differentiate, in my opinion, the case of the sale of goodwill from the case of master and servant or employer and employee. The vendor in the former case would in the absence of some restrictive covenant be entitled to set up in the same line of business as he sold in competition with the purchaser, though he could not solicit his own old customers. The possibility of such competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhances that value, and presumably the price demanded and paid, and, therefore, all those restrictions on trading are permissible which are necessary at once to secure that the vendor shall get the highest price for what he has to sell and that the purchaser shall get all he has paid for" (p. 701).

Dealing with the question of the onus of proof, Lord Atkinson said (p. 700): "If the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void; the onus of establishing to the

App. Div.
1917

MIZON

v.

POHOR-
ETZKY.

Meredith, C.J.O.

App. Div.
1917

MIZON
v.

POHOR-
ETZKY.

Meredith, C.J.O.

satisfaction of the Judge who tried the case facts and circumstances which shew that the restraint is of the reasonable character above mentioned resting upon the person alleging that it is of that character, and the onus of shewing that, notwithstanding that it is of that character, it is nevertheless injurious to the public and therefore void, resting, in like manner, on the party alleging the latter."

The meagre evidence as to the matters which are material for determining the first of the questions referred to by Lord Atkinson, which I have just quoted, is probably due to the fact that the illegality of the restraint for which the agreement provides was not pleaded; and, indeed, the case of *North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited.*, [1914] A.C. 461, shews that, where the contract is *ex facie* illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule the Court will not entertain the question unless it is raised by the pleadings.

The cases shew that a restraint unlimited as to time, as the restraint in question is, is not necessarily invalid, and that the question in each case is, whether the restraint which is imposed is one which was reasonably necessary for the protection of the person in whose favour it is imposed, *i.e.*, in such a case as this, for the protection of the purchaser in the enjoyment of the goodwill of the business he has purchased.

I am unable to come to any other conclusion than that, in the circumstances of this case, the protection which the restraint was designed to afford was not greater than was reasonably necessary for the protection of the respondent in the enjoyment of the goodwill, and that the contract of the appellant was, therefore, a valid and binding contract, unless it has been shewn that, though reasonable as between the contracting parties, it was injurious to the public. The onus of shewing this was upon the appellant, and I can find nothing in the evidence or in the circumstances of the case that warrants a finding that it was injurious to the public.

The learned trial Judge has assessed the damages at \$300, which was the price paid for the goodwill. That would seem to be a large sum to allow, but it is probable that it was allowed

because, in the view of the learned Judge, the action of the appellant has already resulted practically in the destruction of the goodwill.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

App. Div.

1917

MIZON

v.

POHOR-

ETZKY.

Meredith, C.J.O.

[APPELLATE DIVISION.]

1917

July 4.

CLARKSON V. DOMINION BANK.

Banks and Banking—Securities Taken by Bank from Customer—Manufacturing Company—Insolvency—Winding-up—Action by Liquidator and Creditor to Set aside Securities—Promissory Notes—Negotiation—Bank Act, 3 & 4 Geo. V. ch. 9, secs. 88, 90—Advances by Bank—Two Accounts Kept—Overdraft—Consolidation of Accounts—Written Agreement to Give Securities—Advances not Made at Time of Agreement—Substituted Goods—Title of Bank—Mortgages of Real Estate—Validity—Finding of Trial Judge—Appeal—Mortgage of Land in another Province—Jurisdiction.

The judgment of SUTHERLAND, J., 37 O.L.R. 591, was affirmed.

Held, that the demand-notes of the customer (a wholesale manufacturer, the company in liquidation) had been "negotiated" by the defendant bank, within the meaning of sec. 90 of the Bank Act, 3 & 4 Geo. V. ch. 9.

Bank of Hamilton v. Halstead (1897), 28 S.C.R. 235, distinguished.

The records of the transactions in question were kept by the bank in two separate accounts—the purchase-account and the sales-account. At a certain date, the customer had been allowed to overdraw to the extent of \$25,000 beyond its credit-limit of \$200,000, which was explained by the bank-manager saying that the customer was allowed to overdraw in its purchase-account because it had a large credit in its sales-account. The customer had always the privilege of drawing the full amount that had been put to its credit through the negotiation of its demand-notes. And the bank was within its right in refusing to accept the company's demand-notes or to let it overdraw in its purchase-account unless it had an equal amount to its credit in the sales-account. If a customer has accounts at two or more branches, the bank may consolidate them, and *à fortiori* where the two accounts are in the same branch.

In order to validate a security under clause (b) of sec. 90, it is not necessary that the advance should be made at the time the written promise or agreement is given.

Imperial Paper Mills of Canada Limited v. Quebec Bank (1913), 83 L.J.P.C. 67, 110 L.T.R. 91, followed.

Semble, that the bank might have a double title to the whole of the goods covered by the securities: it might claim them under the individual securities by virtue of clause (a) of sec. 90 or under the last blanket-security by virtue of sub-sec. 4 of sec. 88 (removal and substitution of goods) and clause (b) of sec. 90.

Held, that the finding of the trial Judge that two mortgages on real estate made by the customer to the bank were valid, should not be disturbed.

Quære, whether an Ontario Court would have jurisdiction to set aside a mortgage of real estate situate in another Province.

APPEAL by the plaintiffs from the judgment of SUTHERLAND, J., 37 O.L.R. 591.

App. Div.
1917

CLARKSON
v.
DOMINION
BANK.

May 28 and 29. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Sir George C. Gibbons, K.C., and J. B. Davidson, for the appellants. The demand-notes given to the defendant bank were not negotiated in any real sense, no present advance being made at the time they were given. We rely on *Bank of Hamilton v. Halstead* (1897), 28 S.C.R. 235, affirming the judgments in *Halsted v. Bank of Hamilton* (1896-7), 27 O.R. 435, 24 A.R. 152. The bank kept two accounts, but that was farcical—they were practically one account; the keeping of two was merely a device to get over the plain intention of the Act. See the *Halstead* case, 28 S.C.R. at p. 241, where it is stated that the Act “contemplates only cash advances made at the time the assignments are acquired.” [MEREDITH, C.J.O.:—How does the trial Judge get over the *Halstead* case?] The grounds of distinction are not very clearly stated. [MEREDITH, C.J.O., referred to the judgment of Mulock, C.J., in *Townsend v. Northern Crown Bank* (1912), 27 O.L.R. 479, at p. 482, 10 D.L.R. 149.] The learned Chief Justice followed *Bank of Hamilton v. John T. Noye Manufacturing Co.* (1885), 9 O.R. 631, which has been overruled by *Bank of Hamilton v. Shepherd* (1894), 21 A.R. 156, and the *Halstead* case. Reference was also made to *Ontario Bank v. O'Reilly* (1906), 12 O.L.R. 420; *Toronto Cream and Butter Co. Limited v. Crown Bank* (1908), 16 O.L.R. 400—see the dissenting judgment of Meredith, J.A., in that case; *Munro v. Standard Bank of Canada* (1913), 30 O.L.R. 12, 16 D.L.R. 293; *Breese v. Knox* (1897), 24 A.R. 203. The doctrine of pressure does not apply where the insolvency is known to both parties.

D. L. McCarthy, K.C., and A. W. Langmuir, for the defendant bank, respondent, argued that an agreement to give a mortgage is equivalent to a mortgage in such a case as this, and that the mortgages were not subject to attack on the ground of undue preference, where, as in this case, the agreement to give them dated as far back as 1912. As to the *Halstead* case, it is distinguishable, as pointed out by the learned trial Judge, and the respondent confidently relies upon the judgment of the Privy Council in *Imperial Paper Mills of Canada Limited v. Quebec Bank* (1913), 83 L.J.P.C. 67, 110 L.T.R. 91, affirming the judgment of this Court in 26 O.L.R. 637.

Gibbons, in reply.

July 4. MACLAREN, J.A.:—This was an action brought by Clarkson, the liquidator, and the National Match Company, a creditor, of an insolvent manufacturing company, Thomas Brothers Limited of St. Thomas, to set aside the claim of the Dominion Bank to certain goods pledged to it by securities under sec. 88 of the Bank Act, and also two mortgages on real estate in St. Thomas and Montreal.

App. Div.
1917

CLARKSON
v.
DOMINION
BANK.

Maclaren, J.A.

It was tried by Sutherland, J., who, on the 4th August, 1916, upheld the action as to certain goods not connected with the company's manufacturing business, but which they had purchased for resale, and as to these directed a reference, but dismissed the action as to the manufactured goods and material for the same, and as to the two mortgages. The plaintiffs have appealed against such dismissal.

The trial Judge has set out very fully in his judgment, which is reported in 37 O.L.R. 591 (1916), the mode in which business between Thomas Brothers and the bank was carried on, and has made copious extracts from the agreements and other documents. The evidence as to the pledge of goods is almost entirely documentary, and there is very little dispute about the facts, the chief conflict being as to the inferences to be drawn from the proved or admitted facts, and the application of the law to them. As to the two mortgages, the then manager of the St. Thomas branch of the bank was fully examined, and the trial Judge has made findings upon the facts in dispute.

The dealings between the bank and the company had been going on for some years prior to 1908, but it was arranged at the trial that only the documents and dealings from 1908 should be put in, as these would sufficiently shew the nature of the transactions and the method in which the business was carried on between them. The company was granted a line of credit of \$200,000 during this period.

The advances to the company were made from time to time, as stated in their application of the 15th November, 1908, "on the security of all goods, wares and merchandise, raw, manufactured and in process of manufacture," which they then had or which they might have from time to time in their factory, buildings, and premises in St. Thomas, or in certain specified warehouses in Montreal and Ottawa. The application contained the

App. Div.
1917

CLARKSON
v.
DOMINION
BANK.

Maclaren, J.A.

following promise: "And we agree to give from time to time to you security for said advances under section 88 of the Bank Act, covering all the said goods, or by warehouse receipts or bills of lading covering the same or part thereof. This agreement is to apply to all advances made to us under the said line of credit, the intention being that all such goods which we may from time to time have in said buildings or cellars shall be assigned from time to time to you as security for all advances."

All the advances from 1908 to January, 1914, were made on similar terms and upon like requests and promises.

Subsequent to the 29th January, 1914, and up to the 25th March, 1914, when the petition for winding-up was filed, the advances were made on more elaborate requisitions, in the form set out on pp. 599 and 600 of 37 O.L.R., and with the declaration that "This security is given pursuant to the written promise or agreement of the undersigned, and especially of the agreement dated the 29th January, 1914."

The records of the transactions in question were kept by the bank in two separate accounts, called respectively the purchase-account and the sales-account. The former contained on the credit side a record of all the demand-notes which the company gave from time to time, generally for round amounts ranging from \$1,000 to \$10,000. On the debit side were entered all cheques given for the payment of goods, wages, expenses, interest, etc. On the credit side of the sales-account were entered the cash deposited, cheques of customers, drafts for collection, etc.—on the debit side, the demand-notes of the company paid off from time to time, customers' notes or drafts returned unpaid, etc.

Sub-section 3 of sec. 88 of the Bank Act, now found in 3 & 4 Geo. V. ch. 9, during the whole of the period in question, read as follows: "The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture."

Section 90 of the Act reads as follows:—

"The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted,—

“(a) at the time of the acquisition thereof by the bank; or,

“(b) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank;

“Provided that such bill, note, debt or liability may be renewed, or the time for the payment thereof extended, without affecting any such security.”

Counsel for the appellants strenuously argued, first, that the demand-notes given by the company to the bank in this case were never negotiated at all. In support of this proposition he relied upon *Bank of Hamilton v. Halstead*, 28 S.C.R. 235, where it was held that, because the proceeds of the notes discounted were always really under the control of the bank, they were not “negotiated,” nor was there any “debt” contracted at the time, and that the securities were consequently void as against the assignee for creditors. He also cited *Ontario Bank v. O'Reilly*, 12 O.L.R. 420, and *Toronto Cream and Butter Co. Limited v. Crown Bank*, 16 O.L.R. 400, where the claims of the bank were upheld because they were for real advances, and moneys were placed at the disposal of the customers.

The facts of the present case are, however, entirely different from those of the *Halstead* case. The argument in this case is based upon and sought to be supported by some answers of the ex-manager of the bank, taken from his examination for discovery. His attention having been called to the fact that at a certain date he had allowed the company to overdraw \$25,000 beyond its credit-limit of \$200,000, he explained it by saying that he had allowed the company to overdraw in its advance or purchase-account because it had then a large credit in the proceeds or sales-account. It was in effect simply a refusal to accept the company's demand-notes or to let it overdraw in its purchase-account unless it had an equal amount to its credit in the sales-account. So far as the evidence goes, the company had always the privilege of drawing the full amount that had been put to its credit through the negotiation of the demand-notes.

In taking this position the bank was quite within its rights. The law is well settled that, if a customer has accounts at two or more branches, the bank may consolidate them, and a cheque may be refused even when there appears to be money to the credit of

App. Div.
1917

CLARKSON
v.

DOMINION
BANK.

Maclaren, J.A.

App. Div.
1917

CLARKSON
v.
DOMINION
BANK.

Maclaren, J.A.

the customer at the branch where it is presented, if upon the whole there are not sufficient funds: *Garnett v. McKewan* (1872), L.R. 8 Ex. 10; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325, at p. 333. This would apply *â fortiori* where, as in this instance, the two accounts were in the same branch.

It was also argued on behalf of the appellants that the securities in question were bad because the written promises or agreements to give the securities were not made at the time that the demand-notes were negotiated or the debt or liability contracted, and that an antecedent promise or agreement was of no value.

I am of opinion that clauses (a) and (b) of sec. 90 provide for two distinct classes of cases, and that they are quite independent of each other. The appellants' argument would read clause (a) into clause (b), which appears to me to be a wrong interpretation. I think that, for this case, the section should be construed as if clause (a) were not in it at all.

However, this point has, in my opinion, been settled by authority which is binding upon us. In *Imperial Paper Mills of Canada Limited v. Quebec Bank* (1912), 26 O.L.R. 637, 6 D.L.R. 475, this Court upheld securities which were given to the bank long after the promise or agreement and after the advances had been made, even without the amount of the proposed advances being mentioned in the promise or agreement. In one instance the promise was contained in a letter of the 23rd August, 1905, and the demand-note for \$120,000 and the security were not given until the 23rd February, 1906, the advances having been made from time to time during the interval: see pp. 645, 653, and 655. This judgment was affirmed by the Privy Council: *Imperial Paper Mills of Canada Limited v. Quebec Bank*, 110 L.T.R. 91. Lord Shaw, on p. 92, gives a detailed statement of the methods of business followed and adopted, which shews that the two questions we are now considering were present to their minds.

Reference may also be made to *Townsend v. Northern Crown Bank* (1912), 27 O.L.R. 479, at p. 482, 10 D.L.R. 149, where Mulock, C.J., in the Divisional Court, discusses the law as to the renewal of notes and as to securities given in connection therewith. His statement of the law on this point was approved by Anglin, J., in the same case in the Supreme Court of Canada (1914), 49 S.C.R. 394, at p. 401.

Under the facts of this case, it becomes unnecessary to consider the question of the substitution of goods. As the law stood up to the 1st July, 1913, when the new Bank Act came into force, a bank holding securities from a manufacturer could not claim a lien upon goods substituted for those covered by his securities. The new law would apply to all securities given in this case after that law came into force; and, as the advances made and new securities taken after that date amounted to over \$300,000, and the goods on hand at the suspension were valued at only \$83,687.92, the bank might have a double title to the whole of the goods: it might claim them under the individual securities by virtue of clause (a) of sec. 90 or under the last blanket-security by virtue of sub-sec. 4 of sec. 88* and clause (b) of sec. 90.

With regard to the two mortgages on the real estate in St. Thomas and Montreal, their validity depends to a large extent upon the credit to be given to the testimony of the then manager of the bank. The trial Judge had the advantage of seeing and hearing him, and has given him credit, and has made findings thereon in favour of the bank.

Under the circumstances, I do not think we should be justified in reversing his decision as to either of these. If I had come to an opposite conclusion, I am not certain that we should have had jurisdiction to set aside the Montreal mortgage, inasmuch as real estate is governed by the law where it is situate. However, it is not necessary for us to consider that question.

In my opinion, the appeal should be dismissed.

MAGEE, HODGINS, and FERGUSON, JJ.A., agreed with MACLAREN, J.A.

MEREDITH, C.J.O.:—I agree with the conclusion to which my brother Maclaren has come.

But for the decision in *Imperial Paper Mills of Canada Limited v. Quebec Bank*, 110 L.T.R. 91, I should have thought it open to serious question whether the learned counsel for the appellants is not right in his contention that, in order to validate a security under clause (b), the advance must be made at the time the written promise or agreement is given. In other words, that what sec. 90 contemplates is, that the security shall be given at the time of

App. Div.
1917

CLARKSON
v.
DOMINION
BANK.

Maclaren, J.A.

* Sub-section 4 deals with the removal and substitution of goods.

App. Div.
1917

CLARKSON
v.

DOMINION
BANK.

Meredith, C.J.O.

the negotiation or contracting of the bill, note, debt, or liability, or that the written promise or agreement to give the security shall be given at that time.

Although the question raised by the learned counsel for the appellants does not appear to have been raised and was not discussed in the *Imperial Paper Mills* case, the security in that case would have been invalid if the construction contended for by the appellants be the true construction of clause (b), and we should, I think, following that case, hold that the advance need not be made at the time the written promise or agreement is given.

Appeal dismissed with costs

1917

July 4.

[APPELLATE DIVISION.]

RE McALLISTER AND TORONTO AND SUBURBAN R.W. CO.

Railway—Expropriation of Land—Compensation—Award—Quarry of Stone—Jurisdiction of Arbitrators—"Minerals"—Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 133—Determination of Question of Fact by Appellate Court—Sec. 90 (15) of Act.

Upon an arbitration to determine the compensation to be paid to a land-owner for land expropriated by the company for the purposes of its railway, and for severance, and by reason of injury and loss in respect of part of the land known as "the quarry," and other injurious affection, the arbitrators in effect found that the rock comprising the quarry was the ordinary rock of the district, and stated that the quarry had a special value, which they estimated at a named sum, but allowed nothing for it in their award. They stated that they did not assume to decide whether they had jurisdiction to include it:—

Held, that the rock was not a "mineral" within the meaning of the word "minerals" as used in sec. 133 of the Ontario Railway Act, R.S.O. 1914, ch. 185.

Great Western R.W. Co. v. Carpalla United China Clay Co. Limited, [1910] A.C. 83, *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116, *Caledonian R.W. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290, and *Symington v. Caledonian R.W. Co.*, [1912] A.C. 87, applied and followed.

The Court, on appeal from the award, instead of remitting the case to the arbitrators to find whether or not the rock was a mineral, determined the question upon the evidence (sec. 90 (15) of the Act), and ordered that the compensation awarded should be increased by the sum named by the arbitrators.

AN appeal by McAllister, land-owner, from an award made by a majority of a board of arbitrators appointed to determine the compensation to be paid to the appellant for lands expropriated by the railway company, under the Railway Act of Ontario,

for the purposes of its railway, and for the severance of his land by the taking of part, and by reason of injury and loss to that part of the property known as "the quarry," and by cutting off access to the river Speed, and by interference with the land and means of approach at the westerly end of the property, and otherwise injuriously affecting his other lands by the exercise of the company's powers.

The award fixed the compensation at \$4,573.70; and the land-owner appealed upon the ground that an additional sum of \$4,860 and interest should have been allowed.

February 19 and 20. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

M. K. Cowan, K.C., and W. E. Buckingham, for the appellant, referred to *Davies v. James Bay R.W. Co.*, [1914] A.C. 1043, and stated that in this case the question of right to lateral support did not arise. Reference was also made to *Great Western R.W. Co. v. Carpalla United China Clay Co. Limited*, [1910] A.C. 83; *Howley Park Coal and Cannel Co. v. London and North Western R.W. Co.*, [1913] A.C. 11; *Midland R.W. Co. v. Robinson* (1889), 15 App. Cas. 19; *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116; *Caledonian R.W. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290, 298, 299; *Symington v. Caledonian R.W. Co.*, [1912] A.C. 87, 92, 93. The Court has jurisdiction to grant the relief asked for by the appellant: Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 90 (15).

R. B. Henderson and Christopher C. Robinson, for the respondent company, argued that the award was right in excluding from the compensation the sum of \$4,860 which was claimed in respect of the quarry. This consisted of minerals within the meaning of sec. 133 of the Ontario Railway Act, and is excluded from the notice of expropriation given by the company to the appellant. If he had rights in respect of it, the proper tribunal to which to apply was the Ontario Railway and Municipal Board. They referred to the judgment of Lord Loreburn in the *Budhill* case, *supra*, at p. 126; *Great Western R.W. Co. v. Fletcher* (1860), 5 H. & N. 689, 698; *Vézina v. The Queen* (1889), 17 S.C.R. 1. The *Davies* case turned altogether upon the difference between the English and the Canadian Acts.

1917

RE
MCALLISTER
AND
TORONTO
AND
SUBURBAN
R.W. Co.

App. Div.
1917

RE

MCALLISTER

AND

TORONTO

AND

SUBURBAN

R. W. Co.

Meredith, C.J.O.

Cowan, in reply, referred to the *Carpalla* case, at p. 85, and the *Symington* case, at p. 93.

July 4. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the land-owner, McAllister, from the award, dated the 2nd October, 1916, made by the majority of the arbitrators appointed to determine, under the Railway Act of Ontario, the compensation to be paid to him for the land expropriated by the respondent for the purposes of its railway and for the severance of his land, by the land taken, from his other land, and by reason of injury and loss to that part of the property known as “the quarry,” and by cutting off access to the river Speed, and by interference with the land and means of approach to his property at the westerly end of it, and otherwise injuriously affecting his other lands by the exercise of the powers of the respondent.

By the award which was made by a majority of the arbitrators, the compensation is fixed at \$4,573.70.

As to the claim of the appellant for compensation for that part of the property known as the quarry in or under the land taken and for the damage caused to the remainder of the quarry by the respondent in the exercise of its powers, the arbitrators say in their award: “As to compensation to the owner in respect of the matters following, and if we have jurisdiction to award such compensation, which, in view of the provisions of sections 133, 134, and 135 of the Railway Act (Ontario), we do not assume to decide, then the amount of our award as above given, namely, \$4,573.70 . . . should be increased by the further sum of \$4,860 together with interest . . .;” and then follows a statement as to how the \$4,860 is made up. What the “quarry” is will appear later on.

The land-owner appeals upon the ground that this additional sum should have been awarded to him, and the respondent answers that the “quarry” consists of minerals within the meaning of sec. 133,* and that the arbitrators had therefore no juris-

* 133.—(1) The company shall not, unless the same have been expressly purchased, be entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any land purchased by it, or taken by it under any compulsory powers given it by this Act, except only such

diction to award compensation for it, that jurisdiction being by sec. 135 vested in the Ontario Railway and Municipal Board; and that, if that contention is not well-founded, the rock, being the ordinary rock of the district, has been fully compensated for in the allowance that is made by the award.

I agree—and indeed I did not understand Mr. Cowan to argue the contrary—that, if the rock of which the quarry is composed is a mineral within the meaning of sec. 133 of the Ontario Railway Act, the respondent has not expropriated it, and I will assume that if it is a mineral the arbitrators had no jurisdiction to award compensation in respect of it.

The effect of sec. 77 of the Railway Clauses Consolidation Act, 1845 (Imperial), and of the corresponding provisions of the Railway Clauses Consolidation (Scotland) Act, 1845 (sec. 70), which, as I shall afterwards point out, is substantially the same as sec. 133 of the Ontario Act, has been considered by the House of Lords in the recent cases of *Great Western R.W. Co. v. Carpalla United China Clay Co. Limited*, [1910] A.C. 83; *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116; *Caledonian R.W. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290; and *Symington v. Caledonian R.W. Co.*, [1912] A.C. 87.

As I understand the decisions in these cases, they are that, by the words “or other minerals,” which occur in the expression “mines of coal, iron, stone, slate or other minerals” used in sec. 77 of the English Act and sec. 70 of the Scottish Act, exceptional substances are designated, not the ordinary rock of the district, and Lord Loreburn in his speech in the *Budhill* case (p. 127) said that he thought that to be clear. Lord Gorell in the same case said (p. 134): “The enumeration of certain specified matters tends to shew that its” (i.e., the Act’s) “object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone.” Lord Shaw of Dunfermline expressed his concurrence with the judgments of the Lord Chancellor and Lord Gorell, and referred with approval

parts thereof as are necessary to be dug, carried away or used in the construction of the works.

(2) All such mines and minerals, except as provided by sub-section 1, shall be deemed to be excepted from the conveyance of such land, unless they have been expressly named therein and conveyed thereby.

App. Div.
1917
—
RE
MCALLISTER
AND
TORONTO
AND
SUBURBAN
R.W. Co.
—
Meredith, C.J.O.

App. Div.
1917
RE
MCALLISTER
AND
TORONTO
AND
SUBURBAN
R.W. Co.
Meredith, C.J.O.

to the language of Lords Meadowbank and Medwyn in *Hamilton's Case* (1841), 3 D. 1121, and (p. 140) quoted the following passage from the judgment of the latter: "If you were to ask any one whether a common freestone quarry comes under a reservation of mines and minerals they would answer that it did not."

The second proposition established by these cases is, that, in the case of what are referred to by the Lord Chancellor in the *Budhill* case as "exceptional substances," the question whether they are or are not minerals is a question of fact, viz., what the words mean "in the vernacular of the mining world, the commercial world, and land-owners."

The reason for the decision in the *Carpalla* case that the china clay in question there was a mineral, was that it was not part of the ordinary composition of the soil in the district and its presence was rare and exceptional, and that it was of considerable value commercially.

In the *Budhill* case it was held that sandstone was not a mineral within the meaning of the section. The Lord Chancellor, at p. 126, used the following language: "In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether, unless the company chose on notice to buy the ordinary rock lying beneath it. For no one pretends that there is anything exceptional in this sandstone, either in point of higher value or rarity. It was agreed at the Bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk, or clay, or granite, or any other rock which forms the crust of the earth. . . . Speaking for myself, I will not adopt so startling a conclusion unless I am compelled by a decision of this House, from which there is no escape. There is no such decision."

In the *Glenboig* case, the substance which was held on the facts to be a mineral was of "an exceptional character as to its properties and value," and the Lord Chancellor (Loreburn)

again stated what kind of substance is to be excluded under the term "minerals." He said ([1911] A.C. at p. 299): "Upon the other hand, if anything exceptional in use, character, or value was thereunder," (*i.e.*, under the railway line) "that was reserved, provided it could be included under the word 'minerals' as understood in the vernacular of the mining world, and the commercial world, and the land-owner;" and the Lord Chancellor referred to the judgment of the Lord President in the Court below as an admirable exposition of the law.

What the Lord President said is reported in [1910] Court of Sess. Cas. at pp. 961 and 962, and is as follows: "I am of opinion that the propositions deducible from these latest and most authoritative judgments may be thus stated:—

"1. Each case is a question of fact, and must be decided on its own circumstances.

"2. Whether a particular substance is a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral in the vernacular of the mining world, the commercial world, and land-owners.

"3. Nevertheless, inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question, forming the ordinary subsoil of the district, were held to be a mineral and within the exception."

In the *Symington* case the question was one of pleading, and the averment was: "that certain freestone rock underneath land acquired by a railway company did not form the substratum of the soil, but on the contrary was a substance of exceptional character and recognised in the mining and commercial world and by all railway companies and by all proprietors in or through whose lands railway companies had occasion to construct lines and relative works to be a mineral within the meaning of the Act." This was held to be sufficient to warrant the allowance of a proof, though the contrary had been held by the Second Division of the Court of Session.

Lord Shaw treated the pleading as meaning that the stone in question formed an exception to the general rock of the district ([1912] A.C. at p. 93).

App. Div.
1917
—
RE
MCALLISTER
AND
TORONTO
AND
SUBURBAN
R.W. Co.
—
Meredith, C.J.O.

App. Div.
1917
—
RE
MCALLISTER
AND
TORONTO
AND
SUBURBAN
R.W. Co.
—
Meredith, C.J.O.

The language of the Lord Chancellor (Loreburn) is more general, but his observation that he could not accept the proposition that in no circumstances can freestone be a mineral within the meaning of the statute must be taken, in view of what he had said in the *Budhill* case, to mean that freestone, if not the ordinary rock of the country, may be a mineral if so recognised in the mining and commercial world and by land-owners. Counsel for the appellant stated that what the appellant offered to prove was that "freestone here was a substance of exceptional quality and was not the common rock of the district" (p. 91), and he had previously said (p. 90) that the Second Division was wrong in deciding that sandstone or freestone could in no circumstances be a "mineral." I mention this to shew that it was not questioned that, if the freestone were the ordinary rock of the country, it would not be a mineral within the meaning of the Act.

The Ontario statute applicable is R.S.O. 1914, ch. 185, sec. 133, and it is substantially the same as the corresponding provisions of the English and Scottish Acts, except that in the latter the words are "mines of coal, iron, stone, slate or other minerals under," and in the Ontario Act they are "mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under," and therefore the decisions to which I have referred are applicable to the interpretation of the Ontario Act.

There was evidence adduced before the arbitrators to shew that the stone in question was a mineral, within the meaning of the Act, and evidence to shew that it was not.

The result of the evidence, and in effect the finding of the arbitrators who joined in making the award as to it, is that: "The McAllister quarry, as far as the rock composing it is concerned, is the same as others in the neighbourhood. It is a part of a geological formation which is widely spread at Guelph and in the surrounding district. The rock on both sides of the river and on the prison farm and at many other places is to all intents and purposes the same."

That is, in my opinion, a finding, as in my opinion the evidence establishes, that the rock in question is the ordinary rock of the district, and is therefore not a mineral within the meaning of the Act, unless what follows brings it within the exception mentioned in the cases to which I have referred.

The further statement of the arbitrators is: "This quarry has added value because the rock or stone was easily accessible owing to the outcropping face or ledge composing it, and any waste material could without much trouble be got rid of by dumping it on the low land; and also, because other quarries in the neighbourhood are largely worked out, this one has the correspondingly enhanced benefit of the local market in Guelph."

That finding does not, in my opinion, bring the rock in question within the exception, or warrant the conclusion that it is, within the meaning of the Act, a mineral.

A similar finding might properly be made if the substance were ordinary earth or clay for which there was a market, because it was needed for filling up low places in the neighbourhood, and no one would seriously argue that, because of that circumstance, the earth or clay should be held to be, within the meaning of the Act, a mineral.

It is clear that the arbitrators have allowed nothing for the added value which they say the appellant's land has as a quarry, but the reason for that is probably to be found in the statement of the arbitrators that they did not assume to decide the question whether that "part of the property of McAllister, called in the evidence 'the quarry,' was a mineral, and so came within secs. 133, 134, and 135 of the Railway Act (Ontario), in which case our jurisdiction to deal with it would be excluded."

The provisions of the award and of the reasons for the award are inconsistent. If the quarry was not a mineral, the arbitrators should have increased the sum awarded by \$4,860; and it would seem to follow from the fact that no allowance was made in respect of it that the arbitrators treated it as being a mineral, though they say that they did not assume to decide that question.

It is clear that the arbitrators should have decided it, and the question is, what course should be taken by the Court in disposing of the appeal? All the evidence that the parties desired to adduce is before us, and we ought not, I think, to remit the case to the arbitrators to decide the question they have not decided, but the Court should, on the evidence, determine it. Indeed it is expressly provided by sec. 90 (15) that upon the hearing of the appeal the Court shall decide any question of fact upon the

App. Div.
1917

RE
McALLISTER
AND
TORONTO
AND
SUBURBAN
R. W. Co.

Meredith, C.J.O.

App. Div.
1917

RE
MCALLISTER
AND
TORONTO
AND
SUBURBAN
R.W. Co.

Meredith, C.J.O.

evidence taken before the arbitrators as in a case of original jurisdiction.

That being our duty, it should be determined that the quarry is not composed of minerals; and that the compensation awarded should be increased by \$4,860, and the costs of the appeal should be paid by the respondent.

Appeal allowed.

[MASTEN, J.]

1917

July 16.

GETTY AND SCOTT LIMITED v. CANADIAN PACIFIC R. W. Co.

Railway—Carriage of Goods—Demand for Delivery after Earlier Refusal to Accept—Undertaking to Pay Charges—Acceptance—Waiver of Prepayment or Tender—Sale of Goods to Pay Charges—Delay in Transmitting Request for Return of Goods—Negligence—Damages—Carriers or Warehousemen—Shipping Contract—Special Provision as to Damages—Value of Goods at Date of Shipment—Application to Goods Held by Carriers as Warehousemen.

Certain packages of leather were carried by the defendants for the plaintiffs to Galt, and on the 20th May, 1915, delivery thereof was tendered to the plaintiffs, who refused delivery; and it was found that thereafter the defendants became warehousemen of the goods, and retained possession of them as such until the 21st January, 1916, when the defendants sold them for unpaid charges for transportation and storage.

On the 18th January, 1916, the plaintiffs requested the chief agent of the defendants at Galt to deliver the goods to the plaintiffs, and undertook to pay the charges thereon; the agent, on behalf of the defendants, accepted the undertaking; and it was found that prepayment or tender of tolls and charges was thereby effectually waived.

At that date, the goods had been forwarded to Montreal to be sold there; and, in consequence of delay in communicating to the proper authority at Montreal the request to return the goods to Galt, the request did not reach the proper hands in Montreal until after the goods had been sold; and this delay was found to have arisen from the negligence of the defendants' clerks.

In these circumstances, it was *held*, that the defendants were liable in damages; and, although on the 21st January, 1916, they held the goods as warehousemen, they were entitled to the benefit of a provision in the shipping contract that "the amount of any loss or damage for which the *carrier* is liable shall be computed on the basis of the value of the goods at the place and time of shipment"

When the stipulation is one which, by its terms, is to apply to a state of things which may arise after the goods have arrived at their destination, it remains in force notwithstanding that the transit is ended.

Swale v. Canadian Pacific R.W. Co. (1913), 29 O.L.R. 634, distinguished.

Mayer v. Grand Trunk R.W. Co. (1880), 31 U.C.C.P. 248, referred to.

The damages were accordingly computed on the basis of the value of the goods in May, 1915.

ACTION for damages for breach of contract in the failure of the defendants to deliver certain goods shipped over their railway.

The action was tried by MASTEN, J., at the non-jury sittings at Kitchener.

M. A. Secord, K.C., for the plaintiffs.

W. N. Tilley, K.C., and *J. D. Spence*, for the defendants.

July 16. *MASTEN*, J.:—I find against the claim of the plaintiffs that “the defendants entered into an agreement with the plaintiffs by which the defendants were to retain the said leather in their possession until the settlement of the litigation” between the plaintiffs and their vendor. The evidence fails to satisfy me that the defendants’ agent at Galt, or any other representative of the defendant company, ever made any such agreement; and, if made, I should doubt the authority of an agent at Galt or of a clerk at Montreal to conclude such an arrangement.

I find that the goods were duly carried to Galt, and that on or about the 20th May, 1915, delivery thereof was tendered to the plaintiffs, who refused delivery, and that thereafter the defendants became warehousemen of the goods in question, and retained possession of them as such until the 21st day of January, 1916, when the defendants sold them for unpaid charges due them for transportation and storage.

I find that on or about the 17th day of June, 1915, the defendant company made a demand in writing on the plaintiffs and their vendor, one *J. A. Scott*, for payment of their charges against the said goods, and notified the parties that, in default of their being paid such charges, the goods were liable to be sold. A second demand to the like effect was made by the defendants on or about the 30th December, 1915.

I find that at the last mentioned date the defendants had the right to sell the goods, and no agreement waiving such right was made by the defendants down to the 18th January, 1916.

On the 3rd January, the Galt office of the defendant company wired to *T. A. Riddell*, their Toronto officer, in whose possession the goods were: “*Getty and Scott* advise will accept three cases leather my pro 5 stroke 862, please return quick and advise if O.K. to deliver.” (See exhibit 19.)

The witness *Hall*, who was a freight-clerk in the defendants’ office at Galt, swears that, before sending this message, he talked with one *Brigham*, an officer of the plaintiff company, and told him that the defendants held six cases and three bundles of leather, and were instructed to get back three cases, not the other

1917

GETTY
AND
SCOTT
LIMITED

v.
CANADIAN
PACIFIC
R.W. Co.

Masten, J.

1917

GETTY
AND
SCOTT
LIMITED
v.
CANADIAN
PACIFIC
R.W. Co.

three cases, nor the three bundles. I give credit to this testimony. These three cases were thereupon delivered to the plaintiffs; and this action relates solely to the other three cases and the three bundles.

I find that down to the 18th January, 1916, there was no clear and unequivocal request by the plaintiff company to the defendant company to re-deliver to the former the goods in question, and that down to that date the defendant company were entitled to sell the goods in order to pay their tolls and charges.

I find that on the 18th January the plaintiff company requested Sanderson, the chief agent of the defendant company at Galt, to re-deliver the three cases and three bundles in question to the plaintiff company, and undertook to pay the charges thereon; that such undertaking was accepted by Sanderson on behalf of the defendant company; and that pre-payment or tender of the tolls and charges was thereby effectually waived, and Sanderson on that date wired Riddell, the defendants' officer at Toronto, to return the goods in question to Galt—"Getty and Scott will pay charges."

At that date, the goods had been forwarded to Montreal to be sold there. There was an unaccountable delay in communicating this request for re-delivery to the proper authority at Montreal. I find that this delay arose from the negligence of the clerks of the defendant company. In consequence of this delay, the notification to return the goods did not reach the proper hands in Montreal until after the goods had been sold on the 21st January, though the telegram actually reached the defendant company's office in Montreal on the 20th January.

I think the defendants are, under these circumstances, liable; and it remains to consider the question of damages.

The shipping order contains the following provision: "The amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under this bill of lading (including the freight and other charges, if paid, and the duty, if paid or payable and not refunded), unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the amount to govern

such computation, whether or not such loss or damage occurs from negligence."

I think that, while the defendant company held the goods in question on the 21st January as warehousemen, yet they were still carriers within the clause above quoted.

The case of *Swale v. Canadian Pacific R.W. Co.* (1913), 29 O.L.R. 634, 15 D.L.R. 816, is cited to me as laying down the rule that, as the transit had come to an end, and the railway company were, on the 21st day of January, warehousemen, the stipulation above quoted as to the measure of damages has no application, the function of the bill of lading ending with the transit, and this stipulation ending with the bill of lading.

I think that the principle is, that, where the stipulation expressly relates to occurrences happening during the transit, such stipulation ceases when the transit ends, and I think that was the *Swale* case. When the stipulation is one which, by its terms, is applicable to a state of things which might arise after the goods had arrived at their destination, it remains in force notwithstanding the fact that the transit is ended. Such a situation is illustrated by the case of *Mayer v. Grand Trunk R.W. Co.* (1880), 31 U.C. C.P. 248. The principle is elementary, viz.: Did or did not the parties, on the true construction of the agreement, intend that the stipulation should remain in force after the transit ended?

The stipulation now in question appears to me to relate generally to any and all damages for which the defendant company may be liable, and arising as well after as before the transit is ended. The words employed being of general application and used in a commercial document, I think that the real intention was that they should govern the rights of the parties until all obligations arising directly or indirectly out of the receipt of the goods by the carriers had ceased. The fact that the defendants are described as "the carrier" does not, in my view, imply that they must have been carrying at the time the cause of action arose, for in clause 6 the phrase is used, "Subject to the carriers' responsibility as warehousemen only."

The defendants are, in my view, entitled to the benefit of this provision.

The only evidence as to the value of the goods at the date of their receipt by the defendant company in 1915 is, that the

Masten, J.

1917

GETTY
AND
SCOTT
LIMITED
v.

CANADIAN
PACIFIC
R.W. Co.

Masten, J.

1917

GETTY
AND
SCOTT
LIMITED
v.
CANADIAN
PACIFIC
R.W. Co.

plaintiffs paid for them 16½ cents. They are therefore entitled to recover for 9,015½ square feet at 16½ cts., or \$1,487.56. If there is any question as to the number of square feet, I may be spoken to. I shall delay endorsing the record so that this may be done if desired. The moneys treated as paid into Court, being the proceeds of the sale, will be applied on account of this judgment.

Judgment for the plaintiffs for \$1,487.56 with costs.

1917

July 23.

[IN CHAMBERS.]

REX v. OBERNESSER.

Ontario Temperance Act—Magistrate's Conviction—Tenant of Suite of Rooms in Apartment-house—Keeping Intoxicating Liquor in Cellar of House—Use of Separate Compartment—"Private Dwelling-house"—6 Geo. V. ch. 50, sec. 41 (1).

The defendant, the occupant of a suite of rooms in an apartment-house, kept in a compartment of the cellar under the house, of which compartment he had the sole use and occupation, but which did not form part of the suite in which he lived, a stock of intoxicating liquors:—

Held, that the compartment in the cellar should be regarded as part of "the private dwelling-house" in which the defendant resided; and a magistrate's conviction for an offence against sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, was quashed.

MOTION to quash a conviction of the defendant by the Police Magistrate for the City of Hamilton.

The conviction was, for that the defendant "did unlawfully have, keep, or give liquor in other than a private dwelling-house, contrary to the provisions of the Ontario Temperance Act."

Section 41 (1) of the Act, 6 Geo. V. ch. 50, enacts: "Except as provided by this Act, no person by himself, his clerk, servant, or agent, shall have or keep liquor in any place wheresoever other than the private dwelling-house in which he resides, without having first obtained a license . . . "

June 26. The motion was heard by FALCONBRIDGE, C.J.K.B., in Chambers.

H. S. White, for the defendant, contended that the cellar under the apartment-house in which the defendant resided was a proper and legal place in which he might keep intoxicating liquor.

J. R. Cartwright, K.C., for the Crown, *contra*.

July 23. FALCONBRIDGE, C.J.K.B.:—Under the apartment-house in which the defendant resides there is a cellar. It is entered by means of an open stairway from the back verandahs of the apartments, like the rear-entrance to the cellar of an ordinary dwelling. There is no stairway inside the building leading to the cellar. Each of the tenants or occupants of the different suites of apartments has a key to this outside door. The cellar is partitioned off into what the officers call fruit-cellars, and one of these divisions is allotted to each of the occupants. There is a number on each one, corresponding with the number of the apartment to which it belongs, and the tenant has his own separate and individual key to his own compartment, of which he has the sole use and occupation.

I think the intention and effect of this arrangement is to bring this cellar within the curtilage and to give the occupant the same rights as he would have if he had a cellar of his own; that the defendant is, therefore, within the saving clauses of the Act; and the conviction must, therefore, be quashed and the confiscated liquor returned to him.

The defendant pleaded "guilty" to having liquor in his garage, and he had a suspiciously large quantity and assortment of liquor in the cellar, and also *a measure*. There will be no costs of the motion, and there will be an order of protection for the magistrate and officers.

Falconbridge,
C.J.K.B.

1917

REX

v.

OBER-
NESSER.

1917

[KELLY, J.]

July 31.

RE RUTHERFORD.

Insurance—Life Insurance—Will—Change of Beneficiary—Identification of Policy—Preferred Class of Beneficiaries—Stepmother—Ontario Insurance Act, R.S.O. 1914, ch. 183, secs. 171 (5), 178—Condition in Will.

R., whose life was insured for \$1,000 by the Metropolitan Life Insurance Company, under a policy which provided that, in the event of his death before the 19th November, 1933, the insurance moneys were to be paid to Ruth E. R., "stepmother of the insured," was killed in action in September, 1916. After the issue of the policy he made a will in which he referred to other insurance, which he called "city insurance," meaning another policy for \$1,000 on his life, procured by a city corporation on his enlistment for service in the war. By the will he devised and bequeathed all his real and personal property of which he should die possessed, and then disposed of \$2,000 of insurance, in various sums, amongst eight persons; he directed that \$1,000 of the \$2,000 should go to "my mother R. E. R.," and there was a later direction that, "in case I do not receive city insurance the above will be void and the Metropolitan Life will go to my mother:"—*Held*, that the will sufficiently identified the insurance which was payable to Ruth E. R. to make a change of the beneficiary effective: Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (5).

Re Baeder and Canadian Order of Chosen Friends (1916), 36 O.L.R. 30, followed.

A "stepmother" does not come within the preferred class referred to in sec. 178 of the Act.

McHugh v. Grand Trunk R.W. Co. (1901), 2 O.L.R. 600, 606, applied.

The condition of the will on which the disposition of the \$2,000 insurance moneys was to become void did not become operative, the "city insurance" having been paid to Ruth E. R.

APPLICATION by the executor of the will of Arthur Rutherford, deceased, for a summary determination of a question arising out of the provisions of the will and the terms of an insurance policy upon the life of the testator.

May 28. The application was heard by KELLY, J., in the Weekly Court at Toronto.

A. C. Heighington, for the executor and certain adult beneficiaries.

F. W. Harcourt, K.C., for the infant beneficiaries.

W. H. Wallbridge, for Ruth E. Rutherford.

H. S. White, for the insurance company.

July 31. KELLY, J.:—The executor of the will of the late Arthur Rutherford submits to the Court the question whether, having regard to the provisions of the will of the deceased and the form of an insurance policy (number 977403a) of the Metropolitan

Life Insurance Company for \$1,000 on his life, the proceeds of that policy are to be paid according to the terms of the will.

The testator died in action on the 13th September, 1916. The policy referred to bears date the 19th November, 1913, and provides that, in the event of the death of the insured before the 19th November, 1933, the insurance moneys are to be paid to "Ruth E. Rutherford, stepmother of the insured." In the will he refers to other insurance, which he calls "city insurance." On the argument this was said to refer to another insurance for \$1,000 in the same company, which had been issued on the testator's life on his enlistment for overseas service, the policy being one of a large number taken out by the Corporation of the City of Toronto on residents of Toronto who had so enlisted, these policies being on special terms.

The will disposes of \$2,000 of insurance, in various sums, amongst eight persons, \$1,000 of which he directs shall go to "my mother R. E. Rutherford;" and there is a later direction that, "in case I do not receive city insurance the above will be void and the Metropolitan Life will go to my mother."

Two important questions arise: (1) Does the will sufficiently identify the insurance which was payable to Ruth E. Rutherford so as to make a change of the beneficiary effective? And (2) is Ruth E. Rutherford within the preferred class referred to in sec. 178 of the Ontario Insurance Act, R.S.O. 1914, ch. 183?

Many of the cases dealing with the right of an insured to designate a beneficiary or to revoke or re-apportion, etc., the benefits, were decided before the passing of the Act (1912) 2 Geo. V. ch. 33, sec. 171 (5), which appears now as R.S.O. 1914, ch. 183, sec. 171 (5).^{*} This amendment has much enlarged the scope and meaning of that part of the Act as it previously stood.

Under the Act in its present form, in my opinion, the insurance is in this instance sufficiently identified. The testator makes it clear that he intends to deal with and is dealing with his insurance, when he gives, devises, and bequeaths all his real and personal

Kelly, J.

1917

RE
RUTHER-
FORD.

^{*} (5) Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration.

Kelly, J.

1917

RE
RUTHER-
FORD.

estate of which he shall die possessed, and immediately follows this by a reference to \$2,000 insurance (that being, I understand, the total of his insurance, and part of which, it is manifest from the wording of the will, was the \$1,000 of city insurance), which he then and there proceeds to apportion. A declaration so made, under the circumstances, sufficiently identifies the insurance with the subsisting insurance, and sufficiently supports a change of beneficiary. See *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, 28 D.L.R. 424. This view is supported by the general tenour of the will.

This disposition of the moneys to arise from the policy, which on its face is payable to Ruth E. Rutherford, his stepmother, would not prevail if, as is contended by her counsel, she comes within the preferred class referred to in sec. 178 of the Ontario Insurance Act, a class which the Act declares includes the husband, wife, children, grandchildren, and mother of the assured. Is a stepmother within that class; or, in other words, does "mother," where used in that section, include "stepmother?" The Act does not interpret the meaning of the word "*mother*," nor does it give any indication of intention to include one who is only a stepmother of the insured.

"Mother" has elsewhere been defined as a woman in relation to her child—a female parent; and in a broader sense it means that which is a source of anything—a *generatrix*—in which sense it refers to the origin, cause, or root of anything. The prefix "step" when used with "father" or "mother" denotes a relationship from the marriage only of a parent, and not by blood. The distinction thus marked out is of itself sufficient to shew, there being no express declaration to the contrary, that "mother," where used in sec. 178, does not extend to a stepmother so as to bring the latter within the preferred class. Referring to her as "mother," as he did refer to her in his will, did not place her in that class.

The special privileges of preferred beneficiaries are of purely statutory creation. The present is a case where the language of the judgment in *McHugh v. Grand Trunk R.W. Co.* (1901), 2 O.L.R. 600, at p. 606, may well be applied, that the Courts will not, by any liberality in the construction of the language of the Act, extend it to cases or for the benefit of persons not coming

within its precise terms. Particularly does that apply where there is the substantial distinction, already pointed out, in the meaning of the two words "mother" and "stepmother."

What the testator evidently had in mind was, that there were two policies of the Metropolitan Life Insurance Company of \$1,000 each, the proceeds of which he intended to dispose of by will. It is apparent that he desired his stepmother, Ruth E. Rutherford, to benefit in any event to the extent of the amount of one of these policies. If both should become payable, she would by the will receive \$1,000, and the six persons whom he refers to in the will as his sisters and the person whom he refers to as his brother William should benefit, in the proportions he there designated, to the extent of the other \$1,000, that being the aggregate of the sum he gave these seven persons out of his insurance moneys. But if, as he puts it, he did not "receive city insurance," his stepmother was not to be deprived of the benefit already intended for her under the other policy, for in that event the new apportionment would not under the will have any effect; his express declaration being that the distribution by the will of the \$2,000 insurance moneys to his stepmother and the other seven persons he therein named would be void, and "the Metropolitan Life will go to my mother."

It is in evidence that Ruth E. Rutherford is in receipt of the benefits from the city insurance, and so the condition of the will on which the disposition made of the \$2,000 insurance moneys to Ruth E. Rutherford and the other seven beneficiaries therein named should become void, did not arise.

Costs of all parties except Ruth E. Rutherford out of the moneys arising from policy number 977403a; those of the executor being between solicitor and client; no costs to Ruth E. Rutherford.

Kelly, J.

1917

RE
RUTHER-
FORD.

1917

[IN CHAMBERS.]

Aug. 1.

REX v. MARTIN.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Jurisdiction—Unlawfully Having Intoxicating Liquor—"Indian"—Evidence—Indian Act, R.S.C. 1906, ch. 81, secs. 2 (f) (i.), 136—Affidavits Supplementing Evidence before Magistrate—Inadmissibility—Sentence—"Hard Labour"—Interpretation Act, R.S.O. 1914, ch. 1, sec. 25—Distress—Amendment—Criminal Code, sec. 889—Absence of Written Information—Place of Offence.

The defendant, having been convicted by a magistrate for unlawfully having intoxicating liquor in his possession, contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, was imprisoned under a warrant of commitment issued pursuant to the conviction; and a motion having been made for his discharge, upon the return of a *habeas corpus*, it was held:—

- (1) That the mere statement of the defendant to the magistrate that he was an Indian, and therefore, as he attempted to shew, not subject to the Ontario Act, did not go far enough—it was incumbent upon him (if he was to have the benefit of the Indian Act, R.S.C. 1906, ch. 81, sec. 136) to prove that he was a male person of Indian blood reputed to belong to a particular band (sec. 2 (f) (i.) of that Act); and an affidavit supplementing the evidence given before the magistrate was not admissible.
- (2) That a sentence of imprisonment with hard labour may be imposed upon a conviction for an offence against the Ontario Temperance Act: Interpretation Act, R.S.O. 1914, ch. 1, sec. 25.
- (3) That the warrant of commitment and the conviction could, under sec. 889 of the Criminal Code, be amended to meet the objection that it was only in default of sufficient distress that the defendant was to be imprisoned, and that no distress-warrant was issued.
- (4) That the objection that there was no written information or complaint could not prevail, not having been taken before the magistrate.
- (5) That the place of the offence was sufficiently stated in the conviction as "at and in the city of H."

MOTION, upon the return of a *habeas corpus*, for an order discharging the defendant from custody under a conviction by the Police Magistrate for the City of Hamilton for an offence against the provisions of sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, by unlawfully having intoxicating liquor in his possession in the city of Hamilton. He was sentenced to pay a fine of \$200; in default of payment, the fine to be levied by distress; and, in default of sufficient distress, the defendant to be imprisoned and kept at hard labour for three months. The fine not being paid, the defendant was in gaol when the motion was made.

July 19. The motion was heard by SUTHERLAND, J., in Chambers.

D. O. Cameron, for the defendant.

J. R. Cartwright, K.C., for the Crown.

*affid
(1917) 40 O.L.R. 79*

August 1. SUTHERLAND, J.:—Lyman F. Martin was charged with having violated the provisions of sec. 41 of the Ontario Temperance Act, by “unlawfully having liquor in his possession” in the city of Hamilton. He was tried before the Police Magistrate for the said city, and convicted, and sentenced to pay the sum of \$200, “and if said sum be not paid forthwith the said sum be levied by distress and sale of the goods and chattels of the said Lyman F. Martin, and in default of sufficient distress in that behalf the said Lyman F. Martin to be imprisoned in the common gaol of the city of Hamilton, in the said county of Wentworth, and there be kept at hard labour for the space of three months.”

Sutherland, J.

1917

REX

v.

MARTIN.

This is a motion for the discharge of the prisoner, upon the following grounds:—

(1) That the accused is an Indian within the provisions of the Indian Act, R.S.C. 1906, ch. 81; that there is an exclusive jurisdiction in the Dominion Parliament over Indians; and that, sec. 136 of the said Act providing for the punishment of an Indian who shall unlawfully have in his possession any intoxicant, any assumed jurisdiction on the part of the Provincial Legislature must yield, and the conviction, therefore, is, on this ground, illegal.

The only evidence appearing in the proceedings as to the applicant being an Indian is in an answer of the accused himself: “17. Q. Are you an Indian? A. Yes.”

By the interpretation clause of the Indian Act, sec. 2 (f), “Indian” means (i.) “any male person of Indian blood reputed to belong to a particular band.”

It was contended on behalf of the Crown, and I think rightly, that the mere statement of the accused that he was an Indian did not go far enough, and that it was incumbent upon him to prove that he was a male person of Indian blood reputed to belong to a particular band, so as to get the benefit of the Act.

It was sought to supplement the evidence given before the magistrate by an affidavit; but, on the authorities, I could not admit this: *Regina v. Bolton* (1841), 1 Q.B. 66; *Rex v. Morn Hill Camp Commanding Officer*, [1917] 1 K.B. 176; *Rex v. Chappus* (1917), 39 O.L.R. 329.

On this ground of objection the application fails.

(2) It was objected also that there was no provision in the

Sutherland, J.

1917

REX

v.

MARTIN.

Ontario Temperance Act for the imposition of "hard labour." But by the Interpretation Act, R.S.O. 1914, ch. 1, sec. 25, it is provided: "Where power to impose imprisonment is conferred by any Act it shall authorise the imposing of imprisonment with hard labour." This objection fails.

(3) That there was no distress-warrant issued. But, under the Criminal Code, sec. 889, this can be amended. See *Regina v. Murdock* (1900), 27 A.R. 443.

(4) That there was no written information or complaint. But no objection was taken at the hearing on this score: *Regina v. Hughes* (1879), 4 Q.B.D. 614.

(5) That no place is mentioned in the conviction. As a matter of fact, it reads, that the accused "at and in the city of Hamilton did lawfully have liquor," etc.

On all grounds, I think, the motion fails, and must be dismissed with costs.

[An appeal by the defendant from the above decision was dismissed by the Second Divisional Court of the Appellate Division on the 23rd November, 1917. The judgment will be reported in due course. See the note 13 O.W.N. 187.]

1917

[SUTHERLAND, J.]

Aug. 1.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Evidence—Motion to Commit for Contempt of Court—Witnesses Examined on Motion—Refusal to Answer Questions—Motion to Compel Answers—Practice—Motion Made in Action and Directed to Witnesses—Separate School Board—Liability to Criminal Prosecution—Apprehension of Witnesses—Protection under Evidence Act, sec. 7—Rules 228, 338-341, 545—Criminal Code, secs. 164, 165, 390—Separate Schools Act, R.S.O. 1914, ch. 270, sec. 99—Disobedience of Judgment—Paying Salaries to Unqualified Teachers—Welfare of School-children—Excuse for Refusal to Answer.

The plaintiffs launched a motion to commit G., the chairman of the defendant board, for breach of the injunction granted by the judgment of LENNOX, J., in this action, on the 17th December, 1914 (32 O.L.R. 245, 261). As witnesses for the plaintiffs upon the pending motion, G. and certain other persons were examined before a special examiner; and the plaintiffs now moved for an order compelling G. and the other witnesses to attend for re-examination and to answer questions which they had refused to answer and to produce books, papers, and documents relating to the payment of salaries of teachers in the employment of the defendant board, and, in default, for the committal to gaol of G. and the others:—

Held, that this motion was properly made in the action: it was not necessary to begin an independent proceeding by originating notice, making G. and the others parties; the notice of motion was directed to the persons individually affected, and that was sufficient.

Held, also, that there could be no reasonable apprehension on the part of G. or the other witnesses that by answering the questions which they refused to answer they would make themselves or the board liable to a criminal prosecution: the witnesses themselves were fully protected under sec. 7 of the Evidence Act, R.S.O. 1914, ch. 76; the defendant board could not be proceeded against criminally; and the statement of one member of the board, made upon an examination in a civil action, could not be used against another in a criminal proceeding.

Re Ginsberg (1917), 40 O.L.R. 136, referred to.

Consideration of Rules 228, 338 to 341, and 545; secs. 164, 165, and 390 of the Criminal Code; and sec. 99 of the Separate Schools Act, R.S.O. 1914, ch. 270.

Held, also, that three members of a religious teaching fraternity, who were employed by the defendant board as teachers, and were among the witnesses examined whose re-examination was sought, and who admitted that they had been teaching without legal qualification, were not excused from answering questions, as to salaries paid to them, on the ground stated by them, viz., that they had made perpetual vows to devote themselves to the welfare of children and their own sanctification, and that the interests of the school-children might be prejudiced if they answered the questions.

1917
—
MACKELL
v.
OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

MOTION by the plaintiffs for an order requiring Samuel M. Genest and others to attend a second time for examination as witnesses upon a pending motion and to answer questions which they refused to answer upon their former examination, and other proper questions, and to produce books, papers, and documents relating to the payment of salaries of teachers in the employment of the defendants, the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa, and, in default, for the committal to gaol of Genest and the others.

July 19 and 20. The motion was heard in the Weekly Court at Toronto.

W. N. Tilley, K.C., for the plaintiffs.

A. C. McMaster, for Genest *et al.*

August 1. SUTHERLAND, J.:—A motion by the plaintiffs, Mackell and others, suing on behalf of themselves and all other supporters of the Roman Catholic Separate Schools for the City of Ottawa, for an order as set out in the notice of motion, as follows: "That Samuel M. Genest, J. Albert Foisy, Albert Carle, J. Desaulniers (Brother Francis), Theophile Sarlit (Brother Osias), Honore Mailly (Brother Theophilus), each of whom was served with a subpœna and appointment to attend and be examined, and did attend and was examined, as a witness for the plaintiffs in support of a motion now pending before this Court to commit

Sutherland, J.

1917

MACKELL
v.
OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

said Samuel M. Genest, do each re-attend at his own expense, at a time and place to be appointed by the examiner, either in or out of long vacation, and do answer the questions which he refused to answer on his former examination, and other proper questions, and do produce on his re-examination all books, papers, and documents referred to on his previous examination, and all books of account, minute-books, pay-sheets, auditors' reports, and other papers and documents in his custody, possession, or control, in any way relating to the payment of salaries of teachers in the employ of said board at any time since the 17th of December, 1914, and do answer all questions relating thereto; and, in default, that each of them be committed to the common gaol of the county in which he may be found, and that they and the defendant board may be ordered to pay the costs of this application; and for such further or other order as may seem proper."

By the judgment of Lennox, J., dated the 17th December, 1914 (*Mackell v. Ottawa Separate School Trustees*, 32 O.L.R. 245, 261, 18 D.L.R. 456), the defendants herein were perpetually restrained "from continuing in their employ, or paying the salaries, wages, or other remuneration for their services, of teachers who do not possess the proper legal qualifications or who are not authorised to teach pursuant to the provisions of the Separate Schools Act, or the regulations of the Department of Education of the Province of Ontario, as well as the salaries, wages, or other remuneration for their services of teachers who refuse or neglect to conform to the said regulations or who in any manner contravene the said regulations."

By notice of motion dated the 11th May, 1917, the plaintiffs launched a motion in which they asked for an order "that Samuel M. Genest, chairman of the defendant board, may be committed to the common gaol of the county in which he may be found, for breach of the injunction granted by the judgment of the Honourable Mr. Justice Lennox after the trial of this action, dated the 17th day of December, 1914, restraining the defendant from continuing in its employ or paying the salaries, wages, or other remuneration for their services, of teachers who do not possess the proper legal qualifications or who are not authorised to teach pursuant to the provisions of the Separate Schools Act or the regulations of the Department of Education of the Province

of Ontario, as well as the salaries, wages, or other remuneration for their services, of teachers who refuse or neglect to conform to the said regulations or who in any manner contravene the said regulations; and that the said defendant board and the said Samuel M. Genest may be ordered to pay the costs of this motion."

By an affidavit made by the plaintiffs' solicitor on the 2nd May, 1917, and filed in support of the said motion, it is alleged as follows:—

"4. The appeal from the judgment after trial delivered by Mr. Justice Lennox was argued before the first Appellate Division on the 26th and 27th days of April, 1915. I am informed by counsel for the plaintiffs that on the argument counsel for the defendants read to the Court a telegram which referred again to the necessity of some relief being granted from the injunction contained in the judgment of Mr. Justice Lennox. The Appellate Division refused to entertain the application, intimating that any such application must be made to Mr. Justice Lennox. Later in the month of June, 1915, the defendants applied to Mr. Justice Lennox for an order allowing the defendant board to pay all the teachers employed by them, and allowing them to issue debentures for the purpose of paying outstanding debts contracted by the board. The notice of motion, affidavit of Samuel M. Genest, and exhibits to such affidavit, are marked exhibit 'H' hereto. The motion was, on the 15th June, 1915, adjourned by Mr. Justice Lennox until after delivery of judgment by the Appellate Division on the appeal then pending. Leave was reserved to the defendants to renew the motion after the Appellate Division gave judgment, but the defendants have never renewed said motion, and the injunction contained in the judgment of Mr. Justice Lennox has never been altered or amended and is still in full force and effect.

"5. In January, 1915, Honore Mailly, one of the teachers in said school, sued the defendant board in the Division Court at Ottawa for his salary for the months of September, October, November, and December, 1914. On the return of a motion on behalf of said Honore Mailly for judgment in the suit, the board, by its counsel, Mr. Chevrier; of the firm of Belcourt Ritchie & Chevrier, attended and stated to His Honour Judge Gunn, Junior Judge of the County Court of the County of Carleton, by whom said motion was heard, that he did not see the board had any

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

defence to the action, and that he had no particular instructions to oppose the motion. John F. Lanigan, one of the plaintiffs in this action, was permitted to appear at a later date on said motion and to contest the right of the plaintiff (Honore Mailly) to be paid his salary. At the hearing the plaintiff (Honore Mailly) admitted that his certificate had expired on December 31st, 1913, and had not been renewed or validated, and that he was not, during the time for which he was claiming salary, the holder of any other certificate or any other legal authorisation to teach, and that in teaching he used the French language to a great extent as the language of communication and instruction. Judgment was reserved, and no judgment has ever been given. In my belief, the proceedings thus taken by the plaintiff (Honore Mailly) were taken in collusion with the defendant board or officers or servants thereof, and constituted, in my belief, an attempt on the part of the board, or some of its officers or servants, to pay the salary of the plaintiff (Honore Mailly) under the apparent compulsion of a Division Court judgment, but really in contravention of the injunction contained in the judgment of Mr. Justice Lennox. Copies of the writ of summons, claim, plaintiff's affidavit, notice of motion, expired certificate, and stenographer's notes of proceedings on the date fixed for the return of said motion, are marked exhibit 'I' hereto.

"6. From a date on or about the 26th day of July, 1915, until the end of November, 1916, the separate schools, otherwise under the control of the board, were carried on by a commission appointed under an Act of the Legislature of Ontario, 5 Geo. V. ch. 45, but by the judgment of the Privy Council, [1917] A.C. 62, the statute appointing the commission was declared *ultra vires*. Thereafter, on or about the 7th day of December, 1916, the commission restored to the defendant board its books, papers, and documents, and surrendered to it the control and management of the schools.

"7. Since the board was restored to the management of the schools, it has received large sums of money from the City of Ottawa, as I am advised by the treasurer of said city and verily believe, representing taxes and rates paid for the support of said schools by the Roman Catholic Separate School supporters in Ottawa, which moneys would, in my opinion, have been ample

to carry on said schools, if the salaries of only such teachers as were qualified and were obeying the regulations of the Department of Education were paid. The board has, however, been short of funds, as appears by circular letter issued by the board to the teachers on or about the 7th day of February, 1917, marked exhibit 'J' hereto.

"8. On the 29th day of April, 1914, Samuel M. Genest was and since has been continuously chairman of the defendant board.

"9. I have read in the public press of Ottawa certain alleged interviews with Samuel M. Genest, chairman of the board. Marked exhibit 'K' hereto is a copy of a report of an interview with said chairman published in the *Ottawa Citizen* of February 4th, 1916. Marked exhibit 'L' hereto are copies of reports of interviews with said chairman published in said *Ottawa Citizen* on December 27th, 1916, and December 28th, 1916. If, as therein alleged, the board has paid the arrears of salary of all the teachers who previously had been in the employ of the board, this would include salaries of many unqualified teachers, and I believe the defendant board has continued in its employ and has paid the salaries of teachers who do not possess the proper legal qualification to teach in said schools, and who are refusing and neglecting to conform to the regulations of the Department of Education, and are contravening the same, in violation of the judgment of Mr. Justice Lennox, dated 17th December, 1914.

"10. Prior to and since the issue of the writ of summons herein, Samuel M. Genest, chairman of said board, has been actively identified with the affairs of the board in all matters relating to the disputes that have arisen with regard to observance of regulation No. 17, and to the employment, dismissal, and payment of teachers; and, from my knowledge of the manner in which the affairs of the defendant board are conducted, I believe that the salaries of the teachers referred to in the preceeding paragraph would not have been paid without the sanction and concurrence of said Samuel M. Genest."

A motion was made before Kelly, J., for an order to quash and dismiss the said last-mentioned motion. His disposition of the matter is noted in *Mackell v. Ottawa Separate School Trustees* (1917), 12 O.W.N. 265. He dismissed the motion, and in his written reasons said, among other things:—

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

"The grounds stated for the application are: (1) that the proceedings to commit are irregular and not warranted or justified by any Rule of Court; and (2) that the motion is brought in the above-styled action to commit the applicant for breach of an injunction granted in an action in which the applicant is not a party.

"On the argument, the applicant's counsel urged upon the Court that the motion to commit is irregular and a nullity, that the contempt, if any, was not in presence of the Court, that the only mode of bringing the applicant before the Court is by summons, and that it has not been shewn that a copy of the judgment said to have been disobeyed has been served upon him. Much of the material proposed to be used on the motion to commit is not before me, it having been stated that examinations are now proceeding, the evidence taken on which is to be used on that motion. It is in evidence, however, and not contradicted, that Genest, the party whose committal is sought, is and has been continuously since a date prior to the judgment of December 17th, 1914, chairman of the defendant board.

"The motion to commit, as a matter of practice, is properly launched in the action in which the judgment was obtained. The right to proceed against an officer of a corporation for breach of an injunction granted against the corporation has been fully considered in our Courts. In *Re Bolton and County of Wentworth* (1911), 23 O.L.R. 390, which was a case of disobedience of a mandatory order requiring the county corporation to erect a house of refuge, it was held that the remedy of the applicant (a ratepayer who had obtained the mandatory order) was by process of attachment or committal, which was adequately provided for by Consolidated Rules 853 and 855 (now 554 and 556); and that, as the corporation could act only by its officers, and the process could not be issued against the corporation itself, it must be awarded against the individuals who were to do the act required. My brother Middleton, who disposed of that matter, stated at p. 393, that a judgment requiring a corporation to do or abstain from doing an act is a judgment that must be obeyed by all officers of the corporation; the corporation can act only through its officers, and, when the corporation is required to act, all the officers of the corporation upon whom devolves the duty of acting as and for the corpor-

ation, are, in substance and effect, called upon to do what is necessary to carry the decree of the Court into operation; the corporation is an artificial creation, yet it is none the less real; it is a creation of the law and must obey and not defy the law; that its officers and agents must each and all do his and their part, and if, knowing the mandate of the Court and their duty to obey, they fail to discharge this duty, they are guilty of contempt. The cases there cited support the view that, in circumstances such as are here apparent, proceedings for disobedience by a corporation of an order of the Court are properly taken against an individual who, as the agent or officer of the corporation, is to do the act required. Since that decision, however, the practice has been further enunciated by the present Rule 553 (in the exact language of the English Rule 609), that 'Any judgment against a corporation wilfully disobeyed may be enforced by sequestration against the corporation or by attachment against the directors or other officers of the corporation;' and Rule 555 declares that any person not a party against whom obedience to a judgment may be enforced shall be liable to the same process and punishment as if he were a party.

"For the purposes of the present motion, the objection that there has not been sufficient proof of service of the judgment upon the applicant is sufficiently met. As the authorities now stand, it is sufficient if he had knowledge of the judgment. In *United Telephone Co. v. Dale* (1884), 25 Ch. D. 778, it was held that in order to justify the committal of a defendant for breach of an injunction it is not necessary that the order granting the injunction should have been served upon him if it is proved that he had notice of the order *aliunde* and knew that the plaintiff intended to enforce it. This decision was followed in *Re Bolton and County of Wentworth* (*supra*).

"The most recent case in the Ontario Courts touching upon the right to proceed against an officer of a corporation for the corporation's breach of an order of the Court, is *City of Toronto v. Toronto R.W. Co.* (1917), 39 O.L.R. 310. The defendant's manager was there held not to be liable to committal, because it had not been shewn what were his authority or powers, or that he had anything to do with the compilation or furnishing of the statements which the defendant company was by the judgment

Sutherland, J.

1917

MACKELL
v.
OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

required to furnish. It was, however, there stated that if it were shewn that the disobedience of an order of the Court by a corporation was the act of its manager, the order for his committal might properly be made."

To shew what followed later, I quote from a further affidavit made by the solicitor for the plaintiffs on the 12th July, 1917:—

"3. On or about the 11th day of May, 1917, proceedings were commenced herein by notice of motion returnable before this Court on the 23rd day of May, 1917, for an order to commit Samuel M. Genest, chairman of the defendant board, for violation of the terms of the said judgment, which said motion now stands enlarged *sine die*.

"4. A subpoena was duly issued out of this Court on or about the 14th day of May, A.D. 1917, requiring Samuel M. Genest, J. Albert Foisy, and Albert Carle, to appear for examination on behalf of the plaintiffs in support of said motion, before John Bishop, Esquire, a special examiner at Ottawa, and an appointment was duly issued by the said examiner for said examination, in accordance with the practice in that behalf, the said subpoena and appointment being now produced and marked exhibit 'B' to this my affidavit, and copies of said subpoena and appointment were duly served upon Samuel M. Genest, J. Albert Foisy, and Albert Carle, and a copy of said appointment was duly served upon Messrs. Belcourt Ritchie Chevrier & Leduc, solicitors for the defendant board and for said Samuel M. Genest, as appears by the affidavits attached to the said subpoena and appointment, and the said Samuel M. Genest, J. Albert Foisy, and Albert Carle were each paid the sum of \$1, conduct money, as appears by the affidavit of service of said subpoena.

"5. A subpoena was duly issued out of this Court on or about the 14th day of May, A.D. 1917, requiring Honore Mailly (Brother Theophilus) to appear for examination on behalf of the plaintiffs in support of said motion, before John Bishop, Esquire, a special examiner at Ottawa, and an appointment was duly issued by the said examiner for said examination in accordance with the practice in that behalf, the said subpoena and appointment being now produced and marked exhibit 'C' to this my affidavit, and a copy of said subpoena and appointment was duly served upon the said Honore Mailly (Brother Theophilus), and a copy of said

appointment was duly served upon Messrs. Belcourt Ritchie Chevrier & Leduc, solicitors for the defendant board and for said Samuel M. Genest, as appears by the affidavits attached to the said subpoena and appointment, and the said Honore Mailly was paid the sum of \$1, conduct money, as appears by the affidavit of service of said subpoena.

"6. A subpoena was duly issued out of this Court on or about the 14th day of May, A.D. 1917, requiring Theophile Sarlit (Brother Osias) and Joseph Desaulniers (Brother Francis) to appear for examination on behalf of the plaintiffs in support of said motion, before John Bishop, Esquire, a special examiner at Ottawa, and an appointment was duly issued by the said examiner for said examination, in accordance with the practice in that behalf, the said subpoena and appointment being now produced and marked exhibit 'D' to this my affidavit, and copies of said subpoena and appointment were duly served on said Theophile Sarlit (Brother Osias) and Joseph Desaulniers (Brother Francis), and a copy of said appointment was duly served upon Messrs. Belcourt Ritchie Chevrier & Leduc, solicitors for the defendant board and for the said Samuel M. Genest, as appears by the affidavit attached to the said subpoena and appointment, and the said Theophile Sarlit (Brother Osias) and Joseph Desaulniers (Brother Francis) were each paid the sum of \$1, conduct money, as appears by the affidavit of service of said subpoena.

"7. Samuel M. Genest, J. Albert Foisy, Albert Carle, Joseph Desaulniers (Brother Francis), Theophile Sarlit (Brother Osias), and Honore Mailly (Brother Theophilus), appeared before the said Master for examination as witnesses pursuant to the said subpoena and appointment, and were duly sworn and examined on behalf of the plaintiffs.

"8. Now produced and shewn to me and marked exhibit 'E' to this my affidavit is a copy of the stenographer's notes of the evidence of said witnesses taken upon said examination.

"9. On said examination the witnesses refused to answer material questions, and the said Samuel M. Genest, Albert Carle, and Honore Mailly (Brother Theophilus) refused to produce pay-sheets, minute-books, books of account, and documents of the defendant board, as appears by said notes of evidence.

"10. The books and documents called for on behalf of the

Sutherland, J.

1917

MACKELL

v.

OTTAWA

SEPARATE

SCHOOL

TRUSTEES

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

plaintiffs on said examination, together with the reasons assigned for refusing to make said productions and the examiner's rulings, more fully appear in the stenographer's said notes of the evidence.

"11. It is necessary and material, for the purpose of said motion to commit, to ascertain what payments, if any, have been made to teachers employed in the English-French separate schools under the control of the defendant board, in order to establish that the salaries of teachers who did not possess proper certificates or other qualifications entitling them to teach, and of teachers who refused and neglected to conform to the regulations of the Department of Education referred to in the said judgment, were paid salaries contrary to the terms of the said judgment; and, for the purposes aforesaid, it is necessary that the plaintiffs shall secure answers to the questions asked on said examinations and which were not answered by the witnesses, and production of the books and papers by said witnesses which said witnesses declined to produce, as appears by the said notes."

In these circumstances, the plaintiffs now move for an order as already indicated.

By reference to the examinations of the various persons affected as thus far proceeded with, the position taken by them respectively will appear. Attached hereto are extracts from the said examinations put in by counsel.

In a broad and general way, the position taken by Mr. Genest may be gathered from the following question which he declined to answer, on the ground that it might incriminate himself or the defendant board: "Q. Were any moneys of the Board of Trustees for the Roman Catholic Separate Schools for the City of Ottawa paid out during 1916 to any teachers engaged in the service of the board during the year 1915 or 1916 who had not the proper qualifications to teach or no valid certificate?"

On this motion a preliminary objection was taken that the motion should have been begun by originating summons making the parties affected parties thereto—that it should be made in a case in which they were parties. I take it, however, that this objection may be said to be disposed of by my brother Kelly in his judgment. The motion is, of course, not a mere proceeding, but a motion to compel answers and obtain productions so as to secure evidence from which it may be ascertained whether the

injunction granted has been disobeyed or not. It is not a motion to commit as a substantive application.

As a matter of fact, the present motion, in addition to being styled in the Supreme Court of Ontario, is also styled "And in the matter of the above action," and the notice of motion is, of course, directed to the persons affected individually. The preliminary objection cannot, therefore, be given effect to.

It is contended by the plaintiffs that the injunction of Lennox, J., which restrained the defendants from paying salaries to teachers not legally qualified, has been disobeyed, and that, in the face thereof, the defendants paid school-moneys to such teachers.

Rule 545 is to the effect that "a judgment requiring any person . . . to abstain from doing anything, may be enforced by attachment, or by committal." By Rule 228, any party may by subpoena require the attendance of a witness to be examined before any officer having jurisdiction in the county in which the witness resides, for the purpose of using his evidence upon any motion. And Rules 338 to 341 prescribe the procedure as to appointment, subpoena, notice to produce, and the like, and as to examination, cross-examination, and production.

What is sought to be shewn by the evidence of Genest is, that, as chairman, he had to do with the payment of unqualified teachers, and was a party to their payment out of the school-moneys. To this end it is desired, among other things, to secure any cheques signed by him for any purpose, if such be in existence, and to shew that the same were cashed and the moneys paid for the purpose indicated.

The motion is resisted on his part, on the ground that, if he answers such questions, he may expose himself to the risk of criminal prosecution, or, if not himself, then the board.

Reliance is placed for this contention, I think I may say mainly, on the authority of *D'Ivry v. World Newspaper Co. of Toronto* (1897), 17 P.R. 387. I quote from the head-note: "A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person, however, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well-founded."

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

It is suggested that, under sec. 164 of the Criminal Code, which applies to persons disobeying a statute, a criminal prosecution may possibly be instituted against Genest or the board, under the Separate Schools Act, R.S.O. 1914, ch. 270. But sec. 164 of the Code applies to cases where there is no other mode of punishment expressly provided by law. In the Separate Schools Act, however, it is provided, by sec. 99, that "every person elected as trustee who has not refused to accept the office and who at any time refuses or neglects to perform its duties shall incur a penalty not exceeding \$20." Reference to *Rex v. Hays* (1907), 12 Can. Crim. Cas. 423, 14 O.L.R. 201.

It is also suggested that, under sec. 165 of the Code, Genest or the board might be prosecuted for disobeying the lawful order of a Court of Justice; but this section also provides that it shall be applicable only in cases where no penalty is imposed or other mode of proceeding is expressly provided by law. But, under Rule 545, a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by attachment, or by committal. In *Rex v. McMurrer, McMurrer v. Jenkins* (1907), 18 Can. Crim. Cas. 385, it was decided by the Supreme Court of Prince Edward Island that sec. 164 of the Code does not make indictable the wilful violation of a provincial statute which in itself provides a penalty and mode of punishment.

It was also suggested that, under sec. 390 of the Criminal Code, Genest or the board might be prosecuted for a criminal breach of trust, but in that section what is aimed at is something done "with intent to defraud." It is not suggested, however, in the present case, that the action taken by Genest or the board was so taken with any intent to defraud. It is suggested that it is a case of wilful disobedience and recalcitrance.

The apprehension on the part of an officer of a corporation, on his own behalf or on that of the corporation itself, must be a reasonable one; reference to *Scott v. Scott*, [1913] A.C. 417, at p. 461, where Lord Atkinson says, referring to *In re Freston* (1883), 11 Q.B.D. 545: "I am, therefore, of opinion that this case, so far from being an authority that disobedience *per se* of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary."

Having given the matter the best consideration I can, I am entirely unable to see that there can be any reasonable apprehension on the part of Genest or the other witnesses that by answering the questions which they refused to answer they will make themselves or the board liable to a criminal prosecution. In so far, however, as the witnesses are themselves personally concerned, they are fully protected under the Evidence Act, R.S.O. 1914, ch. 76, sec. 7, which is as follows:—

“7.—(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of this Legislature.

“(2) If, with respect to any question, a witness objects to answer upon any of the grounds mentioned in sub-section 1, and if, but for this section or any Act of the Parliament of Canada, he would therefore have been excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of this Legislature.”

Reference to *Re Ginsberg* (1917), 12 O.W.N. 284, 40 O.L.R. 136.

But it is said that, though that may be so, the statute does not include protection in the case of a corporation. I do not see how it can be said that the defendant board itself can be proceeded against criminally, and so any answers given by the witnesses could be used against it, nor could the statement of one member of the board, made upon an examination in a civil action, be used against another in a criminal action.

The three Reverend Brothers examined respectively admitted that they had been teaching without having any legal certificate or authorisation.

Brother Osias (Thoeophile Sarlit) was asked the following questions:—

“Q. Have you been paid any salary for the time you were engaged in teaching in the Ottawa separate schools since the month of September, 1916? A. I decline to answer.

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

Sutherland, J.

1917

MACKELL

v.

OTTAWA
SEPARATE
SCHOOL
TRUSTEES.

“Q. Do you then, Brother Osias, decline to answer any question with respect to any moneys received by way of salary for yourself or any Brothers engaged in the Ottawa separate schools since the month of December, 1914? A. I do.”

Upon his examination by counsel, such were his answers, and no reason was assigned for his declining to make answer.

On cross-examination by counsel for the defendants, he was asked the following questions:—

“Q. Would you care to give me the reason why you decline to answer the questions which have been put to you by Mr. O'Meara with regard to the payment of yourself and the teachers, and, if so, will you state what it is? A. Well, I think I declined in the interests of the schools and children.

“Q. You have taken an oath to devote your life, your knowledge, and efforts exclusively to the teaching of children, have you not? A. Yes, I have made perpetual vows to devote myself to the welfare of the children and to my own sanctification.

“Q. And do you consider that that duty with you is paramount over any other obligation? A. Yes.

“Q. And you consider that it wouldn't serve the interests of the children—it might not serve the interests of the children—if you answered the questions which have been put to you by Mr. O'Meara and which you have declined to answer? A. Yes.”

Upon the examination of Brother Theophilus (Honore Mailly) and Brother Francis (J. Desaulniers), they took the same position.

I am unable to appreciate that such answers constitute a valid or legal reason for refusing to answer the questions propounded to them respectively. I am therefore of the opinion that neither Genest nor any of the Reverend Brothers was justified in refusing to answer the questions asked; and an order must go in the terms of the notice of motion, namely, that Samuel M. Genest, J. Desaulniers (Brother Francis), Theophile Sarlit (Brother Osias), Honore Mailly (Brother Theophilus), do attend again at their own expense before the former examiner, or some other competent examiner, upon the usual notice of his appointment being served upon them, and do answer the questions which they refused to answer on their former examination and other proper questions, and in default that each of them be committed to the common gaol of the county in which they may be found.

The appointment may be given and the examination proceeded with during vacation.

Costs of this application will be costs in the cause to the plaintiffs in any event.

[ROSE, J.]

BALDWIN v. O'BRIEN.

Appeal—Supreme Court of Canada—Effect of Giving Security—Supreme Court Act, sec. 76—Stay of Execution of Judgment—Injunction Remaining in Force—Application for Stay of Injunction pending Appeal—Judgment Entered on Direction of Appellate Division—Judgment of High Court Division—Power of Judge of High Court Division—Judicature Act, sec. 43—Exercise of Power—Circumstances of Case.

By the order of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, the judgment of the trial Judge, dismissing the action, was set aside, and judgment was directed to be entered for the plaintiffs for damages and an injunction restraining certain of the defendants from entering upon the lane in question in the action. These defendants had appealed from the order of the Divisional Court to the Supreme Court of Canada, and security for the costs of the appeal had been given:—

Held, that, while, by sec. 76 of the Supreme Court Act, R.S.C. 1906, ch. 139, the execution of the judgment was stayed, the injunction remained in force. *McLaren v. Caldwell* (1882), 29 Gr. 438, followed.

Bland v. Brown (1916), 37 O.L.R. 534, distinguished.

Held, also, that, although the injunction was contained in a judgment which the Divisional Court directed to be entered, the judgment was the judgment of the High Court Division; and a Judge of that Division, exercising the power of the Court pursuant to sec. 43 of the Judicature Act, had power to stay the operation of it.

Mitchell v. Fidelity and Casualty Co. of New York (1917), 38 O.L.R. 543, and other cases, referred to.

And *held*, having regard to the circumstances, that the power should in this case be exercised.

MOTION by the defendants O'Brien, McLean, and Verral, for an order staying the operation of the injunction contained in the judgment directed to be entered by the Second Divisional Court of the Appellate Division on the 8th June, 1917 (*Baldwin v. O'Brien*, 40 O.L.R. 24), pending an appeal by the applicants to the Supreme Court of Canada from that judgment.

July 30. The motion was heard by ROSE, J., in the Weekly Court at Toronto.

Strachan Johnston, K.C., for the applicants.

John T. Small, K.C., for the plaintiffs.

Sutherland, J.

1917

MACKELL

v.

OTTAWA

SEPARATE-

SCHOOL

TRUSTEES.

1917

Aug. 4.

c 216

2

1

Rose, J.
1917
BALDWIN
v.
O'BRIEN.

August 4. ROSE, J.:—The defendants have appealed to the Supreme Court of Canada from the order of the Second Divisional Court, pronounced on the 8th June, 1917, whereby the judgment of Middleton, J., was set aside and judgment was directed to be entered in favour of the plaintiffs for damages and an injunction restraining the defendants O'Brien, McLean, and Verral, from entering upon, traversing, or in any way trespassing upon or doing damage to the lane in question in the action. Security for the costs of the appeal has been given, and the parties have agreed that, pending the disposition of the appeal, the judgment for the payment of damages and costs will not be enforced, but they have not been able to reach a similar agreement as regards the enforcement of the injunction. The defendants enjoined, therefore, apply to me, as a Judge of the High Court Division, to stay the operation of the injunction.

By the Supreme Court Act, R.S.C. 1906, ch. 139, sec. 76, the perfecting of the security for costs effects a stay of execution in the original cause, except in certain cases which need not here be considered; but, while the execution of the judgment is stayed, the injunction seems to remain in force (*McLaren v. Caldwell* (1882), 29 Gr. 438); and the defendants fear that, if they continue to pass through the lane as they have been doing, they are in danger of a motion to commit.

In *Bland v. Brown* (1916), 37 O.L.R. 534, the injunction restraining the defendant from trespassing proceeded upon the implication that the plaintiffs were entitled to immediate possession, and, as the stay of execution prevented the enforcement of the order for possession, the defendant by continuing in possession was not guilty of a contempt. That case, therefore, differs from the case in hand, and it may be that the danger apprehended by the defendants is a real one.

The case is one of some importance; the Divisional Court had no hesitation about granting leave to appeal; it is not suggested that, by continuing to pass through the lane until the question is decided by the Supreme Court of Canada, the defendants will seriously injure the plaintiffs; none of the prohibitions against staying execution until certain things are done, contained in sec. 76 of the Supreme Court Act, are applicable; and I think, therefore, that, if I have the power that is invoked, I ought to exercise it.

It is not suggested that the operation of the order of the Divisional Court should be stayed. If that was required, probably the stay could be granted only by the Divisional Court itself, not by a member of it. What is said is that, although the injunction is contained in a judgment which the Divisional Court directed to be entered, the judgment is the judgment of the High Court Division; and that a Judge of that Division, exercising the power of the Court pursuant to sec. 43* of the Judicature Act, has power to stay the operation of it.

The cases seem to support the argument: *Mitchell v. Fidelity and Casualty Co. of New York* (1917), 38 O.L.R. 543; *Sharpe v. White* (1910), 20 O.L.R. 575; *Hargrave v. Royal Templars of Temperance* (1901), 2 O.L.R. 126; the Judicature Act, sec. 16 (f); Holmsted's Judicature Act, 4th ed., pp. 158 and 168.

The order will go staying, pending the determination of the appeal, the operation of so much of the injunction as restrains the defendants O'Brien, McLean, and Verral, their tenants, subtenants; servants, workmen, and agents, from entering upon, traversing, or in any way trespassing upon the lands in the judgment mentioned.

The costs will be to the party successful upon the appeal to the Supreme Court of Canada.

* 43.—(1) Every action and proceeding in the High Court Division, and all business arising out of it, except as herein otherwise expressly provided, shall be heard, determined and disposed of before a Judge, and where he sits in Court he shall constitute the Court.

Rose, J.

1917

BALDWIN

v.
O'BRIEN.

1917

[MASTEN, J.]

Aug. 13.

CURRIE v. HARRIS LITHOGRAPHING CO. LIMITED.

ATTORNEY-GENERAL FOR ONTARIO v. HARRIS LITHOGRAPHING CO. LIMITED.

Constitutional Law—Extra-Provincial Corporations Act, R.S.O. 1914, ch. 179—Ultra Vires—Company Incorporated by Dominion Authority—Companies Act, R.S.C. 1906, ch. 79—Power of Province to Require License—Right to Hold Land in Province—Incapacity under Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103—Removal if License Obtained—Effect of sec. 12 of R.S.O. 1914, ch. 179—Action by Provincial Attorney-General—Judicature Act, R.S.O. 1914, ch. 56, secs. 16 (h), 20.

The provisions of the Extra-Provincial Corporations Act, R.S.O. 1914, ch. 179, in so far as they purport to apply to a company incorporated under Dominion authority, are *ultra vires*.

John Deere Plow Co. Limited v. Wharton, [1915] A.C. 330, *Davidson v. Great West Saddlery Co.* (1917), 35 D.L.R. 526, 27 Man. R. 576, and *Harmer v. A. Macdonald Co. Limited* (1916), 30 D.L.R. 640, followed.

The defendant company, incorporated by letters patent under the Dominion Companies Act, R.S.C. 1906, ch. 79, was *held*, not to be prohibited, by reason of not being licensed under the Extra-Provincial Corporations Act, from carrying out its objects and undertakings in the Province of Ontario, and not to be subject to the penalties prescribed by the last-mentioned Act for carrying on business without being licensed.

That Act does not specifically prohibit a company such as the defendant company from acquiring and holding lands in the Province of Ontario; the incapacity to hold land arises from the provisions of the Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103; and, if a company obtained a license under the provisions of the Extra-Provincial Corporations Act, it would thereby receive authority to hold lands in Ontario in accordance with the provisions of sec. 12.

An action by the Attorney-General for Ontario for a declaration of the validity of a Provincial statute is maintainable: Judicature Act, R.S.O. 1914, ch. 56, secs. 16 (h) and 20.

SPECIAL cases stated by the parties in these two actions.

March 26 and 27. The cases were heard by MASTEN, J., at the Toronto non-jury sittings.

C. E. H. Freeman, for Horace B. Currie, the plaintiff in the first action.

T. H. Barton, for the Attorney-General for the Province of Ontario, intervenant in the first action and plaintiff in the second.

F. W. Wegenast, for the Harris Lithographing Company Limited, defendant in both actions.

Christopher C. Robinson, for the Attorney-General for Canada, intervenant.

August 13. **MASTEN, J.**:—These are friendly actions, brought for the purpose of determining as the principal question the constitutionality of the Ontario statute known as "The Extra-Provincial Corporations Act," R.S.O. 1914, ch. 179, in its relation to companies incorporated by Dominion authority under the Canada Companies Act; and, secondly, but as an independent question, the right of a company incorporated under federal authority to hold lands in Ontario without a license.

Each action was heard on a special case agreed upon between the parties, and the two actions were argued together.

At the opening of the argument, Mr. Wegenast, for the defendant in the second action, moved summarily to dismiss it or for a perpetual stay, on the ground that no such action is maintainable under Ontario procedure; in the alternative, he moved by way of demurrer, or to strike out the endorsement on the writ.

I am of opinion that sec. 16 (*h*) and sec. 20 of the Ontario Judicature Act* are applicable and authorise such an action as the present, and I overrule the objection.

It was also noted by consent of counsel that, while the second action is in form for penalties, the plaintiff does not seek a money recovery, but consents to remit the penalties if he is found entitled; the sole purpose being to raise in a concrete and effective form the main question as noted above.

On the main question, namely, "Is the Act in question, in its relation to companies incorporated under Dominion authority, within the powers of the Province of Ontario?" I am of opinion that the answer must be in the negative.

The Harris Lithographing Company Limited is incorporated by letters patent under the Canada Companies Act. *The letters

Masten, J.

1917

CURRIE

v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

ATTORNEY-
GENERAL
FOR
ONTARIO
v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

*The provisions referred to (R.S.O. 1914, ch. 56) are as follows:—

16. . . . (*h*) The Court in the exercise of the jurisdiction vested in it by this Act, in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it shall deem just, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

20.—(1) The Court shall have jurisdiction to entertain an action at the instance of either the Attorney-General for Canada, or the Attorney-General of Ontario, for a declaration as to the validity of any statute, or any provision in any statute of this Legislature, though no further relief be prayed or sought, and the action shall be sufficiently constituted if such Attorney-General is a party thereto.

Masten, J.

1917

CURRIE

v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.ATTORNEY-
GENERAL
FOR
ONTARIO
v.HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

patent purport to authorise it to carry on *throughout Canada* the business of a dealer in stationery and also the business of lithographing, printing, engraving, embossing, and manufacturing.

Under sec. 5 of the Canada Companies Act, R.S.C. 1906, ch. 79, the company in question is constituted, by virtue of its incorporation, a body corporate and politic, and there is thereby vested in it power to sue and be sued, to contract by its corporate name, and to acquire and hold personal property for the purposes for which the corporation is created (see Interpretation Act, R.S.C. 1906, ch. 1, sec. 30).

Section 29 of the Canada Companies Act provides that on incorporation the company is to be vested with (among other things) all the powers, privileges, and immunities, requisite or incidental to the carrying on of its undertaking.

It thus appears that there purports to be vested in the company in question power to carry on throughout Canada the business of a stationer and lithographer; and I think that such power has been validly and effectively conferred on this company, because "the power to regulate trade and commerce at all events entitles the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable:" *John Deere Plow Co. Limited v. Wharton*, [1915] A.C. 330, at p. 340. The Dominion possesses the exclusive authority to confer such powers on a company of this class; and, the Dominion having so conferred them, the Province of Ontario has no jurisdiction to destroy them, or, by legislation directed at this Dominion company as such, to deprive it of its status and powers.

Turning now to the Ontario Act here in question, sec. 7 provides as follows:—

"(1) No Extra-Provincial Corporation coming within class 7 or 8 or 9 shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force; and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such Extra-Provincial Corporation, carry on any of its business in Ontario unless and until such corporation has received such license and unless such license is in force.

“(2) Taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative or no office or place of business in Ontario, shall not be deemed a carrying on of business within the meaning of this Act.”

Class 8 is defined as: “Corporations created by or under the authority of an Act of the Dominion of Canada, and authorised to carry on business in Ontario” (sec. 4.)

In my opinion, this section (7) gives the key-note of the Act; its “pith and substance,” and its purpose as applied to the defendant company, is to preclude it from the exercise of some of its powers and to deprive it of its status in the Province of Ontario *unless and until* it files certain documents, pays certain fees, and takes out a license.

I am of opinion that it was not within the power of the Provincial Legislature to enact this provision (sec. 7) in its present form.

However simple may be the process of procuring a license, however slight may be the delay occasioned to the Dominion company, it is yet an illegal interference which purports for the time being (no matter how short) to prevent the company from exercising its legal powers and to deprive it temporarily of its status.

It is attempted to support the legislation on the following grounds: (1) that it is Provincial legislation enacted under sec. 92 of the British North America Act with respect to licenses in order to the raising of revenue by direct taxation; (2) that it is legislation dealing with property and civil rights, and particularly from the point of view of mortmain laws; (3) that it is legislation dealing with the administration of justice, in providing for the appointment of an agent, service of process, etc.; (4) and in providing for the making of returns; (5) as legislation prescribing penalties to enforce these provisions; (6) and, generally, as legislation affecting property and civil rights and dealing with matters of merely local consequence. See judgment of Cameron, J.A., in *Davidson v. Great West Saddlery Co.* (1917), 35 D.L.R. 526, 27 Man. R. 576, at p. 609.

But, while all these aspects present themselves in the Ontario statute, in substantially the same manner as in the Manitoba Act,

Masten, J.

1917

CURRIE

v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

ATTORNEY-
GENERAL
FOR
ONTARIO

v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

Masten, J.

1917

CURRIE

v.

HARRIS
LITHO-
GRAPHING
CO.
LIMITED.ATTORNEY-
GENERAL
FOR
ONTARIO
v.HARRIS
LITHO-
GRAPHING
CO.
LIMITED.

yet they are, in my opinion, ancillary and supplementary to the provisions of sec. 7, above quoted. I think that the main purpose of the Act here in question is to assert and acquire a direct control over every company before permitting it to carry on its business in the Province; and, until compliance has been yielded to the Provincial license requirements, to exclude the company from the exercise within the Province of some of the powers conferred upon it by the Dominion authority. Such provisions are effective as against foreign companies, but not as against Dominion companies, who are by their constating instruments authorised to carry on their operations throughout every Province of Canada. I think that the purpose above described permeates the whole of the Act in question in such a way as to render it impossible to hold that certain sections of the Act are valid and others invalid.

The very full argument that was addressed to me merits perhaps a more extended discussion, but all phases of the question having been elaborately discussed not only by the Privy Council in the case of *John Deere Plow Co. Limited v. Wharton*, [1915] A.C. 330, but subsequently by the appellate Courts of Manitoba and Saskatchewan in the cases of *Davidson v. Great West Saddlery Co.*, *supra*, and *Harmer v. A. Macdonald Co. Limited* (1916), 30 D.L.R. 640, I am unable, after a careful perusal of these judgments, to add anything that seems likely to assist the elucidation of the subject. I may, however, state generally that my views accord with those expressed by Mr. Justice Perdue in the *Great West Saddlery* case. I do not think that the Ontario Act differs from the Manitoba Act in such a way as to yield any different conclusion from that at which he has arrived.

The only difference to which my attention has been directed is the inclusion in the Ontario Act of sub-sec. 2 of sec. 9, which is as follows: "No limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8, to carry on in Ontario all such parts of its business and to exercise in Ontario all such parts of its powers as by its Act or Charter of incorporation it may be authorised to carry on and exercise therein."

I do not find any corresponding section in the Manitoba Act; and, while the clause above-quoted is in some measure palliative,

it does not go to the root of the difficulty in such a way as to prevent wholly that which I think to be an illegal interference by the Province of Ontario with Dominion legislation.

I, therefore, answer the questions submitted as follows:—

(A) In the case of *CURRIE v. HARRIS LITHOGRAPHING CO. LIMITED*:—

(1) I am of opinion that the provisions of the Extra-Provincial Corporations Act of Ontario, in so far as they purport to apply to the defendant company, are *ultra vires* of the Legislature of the Province of Ontario.

(2) I am of opinion that the defendant company is not precluded, by reason of not being licensed under the said Extra-Provincial Corporations Act, from carrying out its objects and undertakings in the Province of Ontario.

(3) I am of opinion that the defendant company is not subject to the penalties prescribed by the Extra-Provincial Corporations Act for carrying on business without being licensed.

(4) I am of opinion that the defendant company is incapacitated and prohibited from acquiring and holding lands in the Province of Ontario, but that such incapacity and prohibition arises from the provisions of the Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103; and that, if the defendant company obtained a license under the provisions of the Extra-Provincial Corporations Act, it would thereby receive authority to hold lands in Ontario in accordance with the provisions of sec. 12 of the Act in question. But the Extra-Provincial Corporations Act does not by itself specifically prohibit the defendant company from holding lands, though sec. 7 above quoted carries with it a general prohibition.

(B) In the case of *ATTORNEY-GENERAL FOR ONTARIO v. HARRIS LITHOGRAPHING CO. LIMITED*:—

(1) I am of opinion that the provisions of the Extra-Provincial Corporations Act, R.S.O. 1914, ch. 179, are *ultra vires* of the Legislature of the Province of Ontario, and that none of the provisions of the said Act, as now drawn, are valid.

(2) I am of opinion that the defendant company is not precluded from carrying out its objects and undertakings in the Province of Ontario, unless and until it shall have been licensed under the Extra-Provincial Corporations Act.

Masten, J.

1917

CURRIE

v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

ATTORNEY-
GENERAL
FOR
ONTARIO

v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

Masten, J.

1917

CURRIE

v.

HARRIS
LITHO-
GRAPHING
Co.
LIMITED.ATTORNEY-
GENERAL
FOR
ONTARIO
v.
HARRIS
LITHO-
GRAPHING
Co.
LIMITED.

(3) I am of opinion that the defendant company is not subject to the penalties prescribed by the said Extra-Provincial Corporations Act for carrying on business without being licensed.

(4) I am of opinion that the defendant company is incapacitated from acquiring and holding lands for the purpose of its business in the Province of Ontario, by virtue of the Act known as the Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103.

I am further of the opinion that such incapacity and prohibition does not arise by reason of its not being licensed under the said Act, though if it were licensed its incapacity would be removed.

Let judgment be entered after 30 days in accordance with the answers contained in my written reasons for judgment.

No costs.

[Appeals by the plaintiffs and cross-appeals by the defendants in both actions were heard by the First Divisional Court of the Appellate Division on the 26th, 27th, and 28th November, 1917. Judgment was given on the 26th December, 1917, reversing the above judgment except upon one point. The reasons for the judgment of the Divisional Court will be reported in due course.]

1917

[IN CHAMBERS.]

Sept. 10.

REX v. WELLER.

Criminal Law—Vagrancy—Criminal Code, secs. 238, 239—Prostitution in Private Boarding-house—Conviction by Police Magistrate—No Evidence to Sustain—Improper Admission of Evidence as to Venereal Disease—Prejudice—Grounds for Quashing Conviction.

There is nothing in any of the clauses of sec. 238 of the Criminal Code, R.S.C. 1906, ch. 146, since the repeal of (j) and (k) by 5 Geo. V. ch. 12, sec. 7, which can be relied upon to make immorality committed in a private house evidence of vagrancy.

The defendant (a woman) was convicted by a magistrate "of being a vagrant."

Upon a motion to quash the conviction, the only evidence returned by the magistrate was, that on several occasions the defendant had received money "for immoral purposes;" that one man had been infected with venereal disease; and that, upon examination, the defendant was found to be diseased. It was admitted that the oral evidence before the magistrate shewed that the defendant was employed as a servant in a boarding-house, and that the acts of immorality had been with boarders:—

Held, that there was no evidence to support the conviction.

Clause (l) of sec. 238 did not apply, because that clause is not aimed at the prostitute, and because there was no evidence that the defendant had no peaceable profession or calling by which to maintain herself—and the receipt of \$2 on each of two occasions did not shew that she for the most part supported herself by the avails of prostitution.

Held, also, that evidence of the diseased condition of the defendant was improperly admitted, to her possible prejudice; and on that ground, as well as on the other, the conviction should be quashed.

MOTION to quash a conviction of the defendant for vagrancy. The conviction was made by one of the Police Magistrates for the City of Toronto.

1917
—
REX
v.
WELLER.

September 10. The motion was heard by MIDDLETON, J., in Chambers.

T. N. Phelan, for the defendant.

Edward Bayly, K.C., for the Crown.

September 10. MIDDLETON, J.:—The accused was convicted "of being a vagrant," and sentenced to 6 months' imprisonment.

The only evidence was, that on several occasions this woman has received money "for immoral purposes;" that one man had been infected with venereal disease; and that, upon examination by a medical man, the woman was found to be diseased.

It was admitted that the oral evidence before the magistrate disclosed, though it was not recorded, that the woman was employed as a domestic in a boarding-house, and that the acts of immorality had been with boarders.

The conviction cannot be sustained, as the evidence does not bring the case within the vagrancy clauses of the Criminal Code, R.S.C. 1906, ch. 146.

Section 239 makes vagrancy punishable; but vagrancy is defined by sec. 238,* and there is nothing in any of the different

*The provisions of these sections as found in R.S.C. 1906, ch. 146, are as follows:—

238. Every one is a loose, idle or disorderly person or vagrant who,—

(a) not having any visible means of subsistence, is found wandering abroad or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or waggon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment;

(b) being able to work and thereby or by other means to maintain himself and family, wilfully refuses or neglects to do so;

(c) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;

(d) without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two Justices, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms;

(e) loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way;

Middleton, J.

1917

REX

v.

WELLER.

clauses (since the repeal of (j) and (k) by 5 Geo. V. ch. 12, sec. 7) which can be relied upon to make immorality committed in a private house evidence of vagrancy.

Clause (i), dealing with a night-walker or common prostitute wandering in public places and failing to give a satisfactory account of herself, indicates the limit to which this section goes in this direction.

Some attempt was made to support the conviction under clause (l). It was suggested that this woman was supporting herself by the avails of her own prostitution. Two answers are obvious: first, the clause is not aimed at the prostitute, but at the man or woman who supports himself or herself by the avails of the prostitution of another; and, secondly, there was no evidence that this woman had no peaceable profession or calling to maintain herself by, nor could the receipt of \$2 on each of two occasions be said to shew that this woman for the most part supports herself by the avails of her prostitution.

This does not mean that this woman, if a prostitute, is to be unpunished, but that the prosecution must take place under the proper provisions of the Code.

There is another serious matter. The whole proceeding suggests that this woman was sent to prison, not because of the acts of immorality, but because she is diseased. On the trial,

(f) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers;

(g) by discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;

(h) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;

(i) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself;

(j) is a keeper or inmate of a disorderly house, bawdy-house or house of ill-fame, or house for the resort of prostitutes;

(k) is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself; or,

(l) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.

239. Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both: Provided that no aged or infirm person shall be convicted for any reason within paragraph (a) of the last preceding section, as a loose, idle or disorderly person or vagrant in the county of which he has for the two years immediately preceding been a resident.

evidence of her condition was improperly admitted, and so the case is brought within the decisions which compel the quashing of a conviction based upon evidence which should not have been received and which may have prejudiced the accused.

The question of the prevention of the spread of venereal disease is, no doubt, of prime importance, but the remedy must, it seems to me, be found, not in the Criminal Code, but under the Public Health Act.

Order quashing the conviction.

[IN CHAMBERS.]

NEWCOMBE V. EVANS.

Costs—Security for, by Defendant—Action Removed from Surrogate Court—“Plaintiff”—Real Actor—Plaintiff Propounding Will—Caveator Opposing Grant of Probate—Rule 373—Judicature Act, sec. 2 (r).

The lodging of a caveat is not the institution of proceedings in a Surrogate Court. The executor who propounds the will institutes the proceedings, and the onus is upon him to prove it.

In an action removed from a Surrogate Court into the Supreme Court of Ontario, a motion by the plaintiff, the executor who propounded the will, for an order requiring the defendant, the caveator, who was resident out of Ontario, to give security for costs, was dismissed.

Clauses (a) to (i) of Rule 373 provide for the giving of security by a plaintiff; a “plaintiff” is defined by sec. 2 (r) of the Judicature Act; clause (j) of Rule 373 applies to a different case.

Ward v. Benson (1901), 2 O.L.R. 366, and *Moran v. Place*, [1896] P. 214, followed. ✓

AN appeal by the plaintiff from an order of the Master in Chambers dismissing a motion by the plaintiff for an order requiring the defendant to give security for the plaintiff’s costs of an action removed from a Surrogate Court into the Supreme Court of Ontario.

September 18. The appeal was heard by MIDDLETON, J., in Chambers.

G. W. Morley, for the plaintiff.

Frank McCarthy, for the defendant.

September 19. MIDDLETON, J.:—The proceedings originated in the Surrogate Court when the plaintiff propounded a will, the

Middleton, J.

1917

REX

v.

WELUER.

1917

Sept. 19.

Middleton, J.

1917

NEWCOMBE

v.

EVANS.

defendant having filed a caveat against probate. The proceedings were removed to this Court.

The contention of the plaintiff is, that the defendant, having originated the *lis* by the caveat, is, in substance though not in form, the real actor, and must give security, as she is resident out of the jurisdiction.

There are some decisions in Ireland which lend colour to this contention, but the decision of Sir Charles Moss in *Ward v. Benson* (1901), 2 O.L.R. 366, is conclusive.

The question had been considered in the English Court of Appeal in *Moran v. Place*, [1896] P. 214, a case not cited in *Ward v. Benson*, and that Court had arrived at the same conclusion. The lodging of a caveat is in no sense the institution of the proceedings in the Surrogate Court.

The executor who propounds the will institutes the proceedings; the onus is upon him to prove it. The caveat is a mere notice, by one who is entitled to be heard, that he desires to assert that right and to be heard.

Where security is sought from one who is named as defendant in an issue, the question is very different. There the names "plaintiff" and "defendant" are names used for convenience only. The issue is not a proceeding instituted by one party against the other, and the inquiry is there as to substance as distinct from mere form.

Under the present Rules the distinction is recognised. Rule 373, clauses (a) to (i), provide for the giving of security by a plaintiff, i.e., "a person asking any relief . . . by any form of proceeding:" Judicature Act, R.S.O. 1914, ch. 56, sec. 2 (r); and clause (j) deals with the case of issues by enabling security to be ordered as against either party who is "an active claimant."

The appeal will be dismissed, with costs to be paid by the plaintiff to the defendant in any event.

[A motion for leave to appeal from the order of MIDDLETON, J., was heard by FALCONBRIDGE, C.J.K.B., in Chambers, on the 25th September, 1917, and dismissed.]

[MIDDLETON, J.]

1917

Sept. 21.

SEAGRAM V. PNEUMA TUBES LIMITED.

Fines and Penalties—Action for Penalties—Company—Default in Making Government Returns—Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 135—Remission of Penalties—Fines and Forfeitures Act, R.S.O. 1914, ch. 99, sec. 6—Application to Court—"Court or Judge having Cognizance of the Proceedings"—Action in Supreme Court of Ontario—Forum—Master in Chambers—Jurisdiction—Judge in Court—Rules 205, 207—Terms of Remission—Restoration of Plaintiff to Former Position—Payment of Costs.

The jurisdiction given by sec. 6 of the Fines and Forfeitures Act, R.S.O. 1914, ch. 99, to "the Court or Judge having cognizance of the proceedings for the recovery" of a fine, penalty, or forfeiture, to remit, "such fine, penalty, or forfeiture," cannot be exercised, where the action to recover the fine, penalty, or forfeiture, is brought in the Supreme Court of Ontario, by the Master in Chambers; but may be exercised by a Judge, sitting in Court, at any time after the commencement of the action.

Rules 205 and 207 considered.

In an action against an incorporated company and its secretary to recover \$12,760 as penalties incurred under the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 135, for not making returns to the Government, it appeared that the plaintiff had been induced by false and fraudulent statements of a broker, acting for the company, to pay \$3,000 for shares in the company. She brought an action against the broker and the president and secretary of the company to recover her \$3,000; in that action the returns were demanded, and it was found that they had never been made. The plaintiff then applied to the Attorney-General for leave to sue for the penalties; and, after some delay in order to afford the company an opportunity to make the returns, the leave was granted, and this action was begun. Two days later the returns were made. An application was then made by the defendants to the Attorney-General to rescind the leave to sue or to remit the penalties; this was refused.

Upon application by the defendants to a Judge in Court, an order was made, under sec. 6 (as above), remitting the penalties, upon the terms that the defendants should repay to the plaintiff the money received from her for the shares, with interest at 6 per cent., and her costs as between solicitor and client of both actions and the proceedings before the Attorney-General.

MOTION by the defendants by way of appeal from an order of the Master in Chambers refusing, on the ground that he had no jurisdiction, the defendants' motion, under the Fines and Forfeitures Act, R.S.O. 1914, ch. 99, sec. 6,* to remit the penalties sued for in this action; and, in the alternative, for an order now remitting the penalties.

*6.—(1) Where a pecuniary fine, penalty or forfeiture is imposed by or under the authority of any Act of this Legislature the Court or Judge having cognizance of the proceedings for the recovery thereof may at any time after the commencement thereof remit in whole or in part such fine, penalty or forfeiture whether the money is in whole or in part payable to the Crown or to some person other than the Crown and whether the same is recoverable by indictment, information, summary process, action or otherwise.

(2) This section shall not be held to give to a police magistrate or justice of the peace the authority herein mentioned.

1917

SEAGRAM
v.
PNEUMA
TUBES
LIMITED.

September 19. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

J. J. Gray, for the defendants.

George Bell, K.C., for the plaintiff.

September 21. MIDDLETON, J.:—The action is against the company and its secretary to recover \$12,760, the amount of penalties said to have been incurred under the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 135, which requires certain annual returns to be made and (sub-sec. (6)) imposes a penalty of \$20 per day for every day during which the company makes default in making its returns, upon the company and upon every director, manager, or secretary, who wilfully authorises or permits such default. Such penalties are recoverable only by the Crown or by a private person suing on his own behalf with the written consent of the Attorney-General.

The circumstances giving rise to this action may be very shortly stated. The company has never reached the stage of active operation. It was incorporated to exploit a patent, and the patent is apparently its sole asset.

The plaintiff is a woman who had accumulated \$3,000, and was induced by one Kemish, a broker acting for the company, to invest this sum in stock of the company, by fraudulent statements as to its value—among others, that the stock was being held by Mackenzie-Mann interests and their associates, and was not being offered to the public. This statement was entirely false—Messrs. Mackenzie and Mann and their associates had nothing to do with the company.

An action was brought against the broker and the president and the secretary of the company to recover this \$3,000 or for damages.

This money was apparently the only cash the company ever had, and was used to pay for the incorporation, some experimental work on the invention, and commission to the broker—the details are not satisfactorily shewn in the examination.

The returns were desired by the plaintiff's solicitor for the purpose of demonstrating the untruth of the representations on which the stock was sold. On it being ascertained that no returns had been made, application was made to the Attorney-General

for leave to sue for the penalties. The Attorney-General took the position that an opportunity should be afforded to the company and its officers to remedy their default. The company and its secretary were communicated with, several times, by the Attorney-General's department, but no returns were made, and no explanation given; and, after more than three months, leave to sue was given on the 10th October, 1916, and on the 8th November, 1916, the writ of summons commencing this action was issued. On the 10th November, the returns were made.

An application was then made to the Attorney-General for relief, either by the rescission of his leave to sue, or by remission of the penalties. This application was refused, the Attorney-General leaving the applicants to such relief as they may be able to obtain in the Courts.

A motion was then made to the Master in Chambers, and he rightly held that he had no jurisdiction under the statute. Under Rule 205, any power conferred upon the Court is to be exercised by a Judge sitting in Court unless it is provided in the Rules that it may be exercised either by a Judge or Master in Chambers. The applications that may properly be made in Chambers are enumerated in Rule 207, and this motion does not fall under any of its clauses.

So far as this motion is an appeal, it is dismissed.

Regarding the motion as a substantive application, Mr. Bell contends that the application can only be made at the trial or after there has been an admission or adjudication of liability. I do not agree. The provision of the statute, sec. 6 (1) of the Fines and Forfeitures Act, enables the motion to be made "at any time after the commencement" of the action to "the Court or Judge having cognizance of the proceedings." The Court having cognizance of the proceedings is the Supreme Court; and this motion, in view of the Rule quoted above, is well made.

The more serious question is as to the terms upon which relief should be granted. I have come to the conclusion that the only terms should be the restoration of this unfortunate woman to the position in which she was before she was induced to part with her money—that is, that she should be repaid the money received from her for stock, with interest at 6 per cent., and her costs as between solicitor and client of both actions and the proceedings before the Attorney-General.

Middleton, J.

1917

SEAGRAM

v.

PNEUMA

TUBES

LIMITED.

Middleton, J.

1917

SEAGRAM
v.
PNEUMA
TUBES
LIMITED.

Mr. Gray suggests that she should be left to her remedy in the other action, and that no terms beyond payment of the costs of this action should be imposed. This does not seem to me at all adequate. The company, through its brokers and officers, received this woman's money for worthless stock. It may be difficult and impossible to bring this home to individuals in such a way as to secure a refund of the money. She has a statutory claim for a much larger sum. She ought not to be allowed to assert this as a means of profit, but it seems to me inequitable to deprive her of it on any other terms than those indicated.

The individual defendant will, no doubt, feel that this is a hardship, so far as he is concerned; but he must bear in mind that he is asking to be relieved from a liability he is under to this plaintiff, not as a matter of right but as an indulgence; and, as already said, I cannot see any justification for an order which will leave this woman with a law-suit yet to fight.

If the defendants are not content to accept relief upon these terms, the motion will be dismissed with costs.

[IN CHAMBERS.]

1917

Sept. 26.

REX v. AXLER.

Ontario Temperance Act—Magistrate's Conviction for Keeping Intoxicating Liquor for Sale—"Wine" Containing Large Percentage of Proof Spirits Found in Warehouse of Wholesale Grocer—Secs. 2 (f) and 88 of Act—Evidence of Fitness for Use and Actual Use as Beverage with Resulting Intoxication—Admissibility—Permissive Clause, sec. 125—Application of—Absence of Medication—Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. (D.) ch. 56—Effect as Regards Ontario Act—7 & 8 Geo. V. (D.) ch. 30, sec. 4D.

The defendant, a wholesale grocer, upon prosecution before a magistrate for keeping intoxicating liquor for sale contrary to the Ontario Temperance Act, 6 Geo. V. ch. 50, was proved to have had in his possession, at his warehouse, a quantity of "Hall's wine," which, on analysis, was found to contain 31.33 per cent. of proof spirits. The defendant was convicted:—*Held*, upon a motion to quash the conviction, that the wine must be "conclusively deemed to be intoxicating" (sec. 2 (f) of the Act); and the defendant was liable to be convicted unless he proved that he did not commit the offence charged (sec. 88); but evidence given on behalf of the prosecutor to shew that the wine was capable of being used and was in some boarding-houses used as a beverage, and that its use resulted in intoxication, was not inadmissible: it went to confirm the statutory presumption that the wine was intoxicating and to negative the suggestion that the wine was so medicated as to prevent its use as an alcoholic beverage.

Held, also, that the wine did not come within the requirements of sec. 125, which stipulates that the Act shall not prevent the sale of certain fluids

containing alcohol; and the defendant himself did not come within that section, not being a druggist, or the manufacturer of the wine, or a merchant who dealt in drugs and medicines.

Held, also, that the Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. ch. 56, is not to be taken to be *in pari materid* with the Ontario Temperance Act; nor, by the importation of sec. 7 of the Dominion Act, is the Ontario Act to be read as exempting from its operation all proprietary medicines duly registered.

Differences between the two Acts pointed out and their meaning and scope defined.

Reference to the Dominion statute 7 & 8 Geo. V. ch. 30, sec. 4D, enacting that the provisions of the Proprietary or Patent Medicine Act "shall not be deemed to in any way affect any provincial law."

1917
—
REX
v.
AXLER.

MOTION to quash the conviction of the defendant, by a magistrate, for an offence against the Ontario Temperance Act, 6 Geo. V. ch. 50.

September 22. The motion was heard by MIDDLETON, J., in Chambers.

T. N. Phelan, for the accused.

Edward Bayly, K.C., for the Crown.

September 26. MIDDLETON, J.:—The defendant is a wholesale grocer, and had in his possession at his warehouse four cases of "Hall's wine." This, on analysis, was found to contain 31.33 per cent. of proof spirits, and so must be "conclusively deemed to be intoxicating:" sec. 2 (f) of the Ontario Temperance Act.

The defendant was prosecuted for keeping for sale contrary to that Act; and, under sec. 88, having been proved to be in possession of liquor, he was liable to be convicted unless he proved that he did not commit the offence charged.

The Crown did not rest its case upon this section, but gave evidence going to shew that the liquor in question was capable of being used as a beverage, and was in fact a common beverage in foreign boarding-houses where drinking is going on, and that its use in these places resulted in intoxication.

The first objection is to this evidence. I cannot see any foundation for its rejection. It went to confirm the statutory presumption that the liquor was intoxicating and to negative the suggestion that the wine was so medicated as to prevent its use as an alcoholic beverage.

The main argument was based on sec. 125, which stipulates

Middleton, J.

1917

REX

v.

AXLER.

that the Act shall not prevent the sale: (a) by a druggist or by the manufacturer, of: (i.) any tincture, fluid extract, essence or medicated spirit containing alcohol prepared according to a formula of the British Pharmacopœia or other recognised standard work on pharmacy; or (ii.) medicine, etc.; or (iii.) perfumes; or (iv.) for purely medicinal purposes, any mixture so prepared containing alcohol and other drugs or medicine; nor (b) by a merchant who deals in drugs and medicines, of such compounds, mixtures, and preparations as are in this section hereinbefore mentioned and are so made or put up by a druggist or manufacturer, by reason only that the same contain alcohol, but this applies only to such "compound, mixture and preparation as contains sufficient medication to prevent its use as an alcoholic beverage."

A careful analysis of the section shews that it contains two distinct requirements before the alcoholic mixture may be sold. First, there is the overriding provision that it must be of sufficient medication to prevent its use as an alcoholic beverage; and, second, it must fall within some one of the four divisions enumerated in clause (a), for clause (b) merely extends to the merchant dealing with the products the same protection that (a) affords the druggist or manufacturer.

Now sub-clause (i.) of clause (a) applies only to tinctures, etc., or medicated spirits prepared according to a formula of the Pharmacopœia or similar standard work, and cannot be made to apply to any proprietary or patent medicine which has not obtained this recognition, much less can it be invoked for the protection of any alcoholic beverage which masquerades as a patent medicine for the purpose of reaching the consumer clothed in garments of apparent innocence.

This is not a medicine nor a perfume, so does not come under sub-clauses (ii.) and (iii.).

Nor does it come under sub-clause (iv.), for that relates to the sale, "for purely medicinal purposes," of any "mixture *so prepared* containing alcohol and other drugs or medicine." The words "so prepared" relate back to the words of sub-clause (i.) and shew that the preparation must be in accordance with the formula of the British Pharmacopœia or other standard work on pharmacy.

In this case there is no suggestion that the wine sold was "so

prepared." According to the analysis, it is about one-third proof spirit—glucose and sugar $8\frac{1}{2}$ per cent., extractive matter 1.72 per cent., mineral ash one-fourth of 1 per cent. No trace of medication was found.

This liquor does not come within either of the requirements of the section.

The accused has not brought himself within the section for another reason. Clause (a) protects the druggist or manufacturer. Clause (b) protects "a merchant who deals in drugs and medicines," who sells preparations put up by a druggist or manufacturer. The accused describes himself as "a wholesale grocer," and states that he buys this wine, jobbing it for the vendors selling by the box to people who sell patent medicines. He does not state that he "deals in drugs and medicines;" the inference would rather be that he is a jobbing agent for this particular wine. It may be that a grocer may in some instances sell drugs and medicines so as to be protected, but *primâ facie* a grocer is one who "deals in general supplies for the table and for household use" (Century Dictionary); and this points somewhat suggestively to the use of this wine as a beverage rather than as a medicine.

An argument was made by counsel for the accused which requires careful attention. It was said that the Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. ch. 56, which requires all remedies which are not compounded according to a formula found in the British Pharmacopœia or similar works, to be registered, must be taken to be *in pari materiâ* with the Ontario Temperance Act, and that that Act, excepting from its operation all alcoholic compounds sufficiently medicated to prevent their use as a beverage, must be read as exempting from its operation all proprietary medicines duly registered, because the Dominion statute (sec. 7) prohibits manufacture, importing, or offering for sale of any proprietary medicine which (b) contains alcohol in excess of the amount required as a solvent or preservative, or does not contain sufficient medication to prevent its use as an alcoholic beverage.

This argument appears to me to be unsound. The Acts of one Legislature may be read together, but not the Acts of separate legislative bodies. If the Ontario Legislature intended what is contended, it would have so enacted. The question under the

Middleton, J.

1917

REX

v.

AXLER.

Middleton, J.

1917

REX

v.

AXLER.

Ontario Act is one of fact, and the Dominion registration does not afford any evidence of the nature of the compound sold.

But the Ontario Act and Dominion Act are both misunderstood when this argument is presented.

As already pointed out, the former deals not with any preparation so medicated as to prevent its use as a beverage, but only with medicated spirits, etc., prepared according to the Pharmacopœia, and so medicated as to prevent their use as a beverage.

The Dominion Act, 7 & 8 Edw. VII. ch. 56, sec. 7, contains an absolute prohibition of the sale of a "proprietary or patent medicine," defined by sec. 2b as being an "artificial remedy or prescription manufactured for the internal use of man," the composition of which is not found in the British Pharmacopœia, or upon which there is not a label giving the true formula. Under the Dominion Act itself, registration is not made evidence that the compound is in accordance with the law, but (sec. 14) is accepted as a qualified excuse when the vendor acted in good faith and shews "that he could not with reasonable diligence have obtained knowledge of such medicine being of a character contrary to the provisions of this Act." In that case he may be relieved from any penalty beyond the costs of the prosecution.

The Dominion Act is a statute to regulate the sale of patent medicines, and it makes it an offence to sell an alcoholic beverage as a medicine.

The Ontario Act is an Act prohibiting the sale of liquor, and it exempts from its provisions any medicine prepared according to the Pharmacopœia which is so medicated as to prevent its use as a beverage. It contains no exemption in favour of patent medicines.

The Dominion Act does not license or sanction the sale of alcoholic patent medicines even when medicated; all that can be said is that it does not then prohibit the sale.

There is nothing in the two Acts that in any way clashes. If there were any conflict, then the Ontario statute would have to yield. The Dominion has recognised the situation by enacting, in the session just closed, that any penalty under the Dominion statute shall be in addition to any penalty under any provincial law, and that the provisions of the Dominion statute "shall not be deemed to in any way affect any provincial law:" 7 & 8 Geo. V. ch. 30, sec. 4D.

The motion fails and must be dismissed with costs.

[APPELLATE DIVISION.]

1917

Sept. 28.

SMITH V. MERCHANTS BANK OF CANADA.

Vexatious Proceedings—Application to Stay Action as Frivolous and Vexatious—Former Litigation—Claims not Identical—Banker and Customer—Accounts—Judgment—Res Adjudicata—Fraud—Rule 523—Right to Impeach Judgment in Subsequent Action—Dismissal of Actions for Failure to Comply with Orders for Security for Costs—Not a Bar to Subsequent Action for same Cause—Leave to Proceed—Condition—Payment of Costs of Former Actions—Set-off.

An order of MASTEN, J., in the High Court Division, perpetually staying the proceedings in this action, on the ground that it was frivolous and vexatious and an abuse of the process of the Court, was on appeal set aside by a Divisional Court of the Appellate Division (MEREDITH, C.J.C.P., dissenting); and the plaintiff was allowed to proceed, on paying the costs of two former actions brought respectively in 1913 and 1916 against the same defendants for the same causes, which actions were dismissed for default of compliance with orders for security for costs, such costs to be set off *pro tanto* against the plaintiff's costs of the appeal and of the application upon which the order appealed against was made.

Held, per RIDDELL, J., that the dismissal of an action for failure to comply with an order for security for costs is not a bar to another action for the same cause; but the Court has inherent power to stay the second action till the costs of the first are paid.

An action was brought by the plaintiff against the defendants in 1895, the claims in which arose out of transactions between the plaintiff as customer and the defendants as bankers in the same period of time as the transactions out of which the claims in this action arose. In both actions the plaintiff charged the defendants with fraud. The action of 1895 and a counterclaim therein were tried in 1897, and a judgment was given mainly in favour of the defendants, from which judgment there was no appeal:—

Held, per RIDDELL, J., upon an examination of the claims in both actions, that nearly all the claims in the present action were new, at least in form, and had not been specifically disposed of by the judgment of 1897. There was no *res adjudicata* apparent concerning them; but the defendants might, if so advised, plead *res adjudicata* as to all the claims.

As to the relief denied in the former action, it was open to the plaintiff to move under Rule 523 to impeach the judgment on the ground of fraud subsequently discovered, but he was not bound to do so. He might proceed by action; and, if the defendants pleaded *res adjudicata*, he might amend by setting up fraud and claiming to have the former judgment set aside *pro tanto*.

Per MEREDITH, C.J.C.P. (dissenting):—The claims in the action brought in 1895 covered all that could be claimed in this action; in the former action the accounts were taken, and judgment given disposing of all the claims. The accounts could not now be reopened, except after a successful attack upon that judgment on the ground that it was obtained by fraud, of which there was no allegation and no evidence. In all the circumstances, and having regard particularly to much harassing litigation in the period between the judgment of 1897 and the bringing of the present action, the proper conclusion was that this action was vexatious and inexcusable. The interests of the public and of the parties required that there should be a limit to litigation—a rule in accord with which are all the statutes of limitations. The plaintiff's claim was one with regard to simple debts, in connection with his own business; if the debts ever existed, they had long since been barred by the Limitations Act.

AN appeal by the plaintiff from an order of MASTEN, J., in the Weekly Court, directing a perpetual stay of proceedings in

App. Div.

1917

SMITH

v.

MERCHANTS
BANK OF
CANADA.

this action, on the ground that it was frivolous and vexatious and an abuse of the process of the Court.

May 9. The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., RIDDELL and ROSE, JJ.

Gideon Grant, for the appellant. The action should be allowed to proceed. In regard to a former action which came on for trial at Brockville, the judgment was obtained by default; the plaintiff's counsel was not present. At any rate, this present action is not barred by the judgment in the former action, because the causes of action in the two actions are not the same. As to the Montreal action in 1913, and the action begun in this Court in 1916, both of which were dismissed because of non-compliance with orders for security for costs, a judgment upon such default is no bar to a subsequent action such as the present one: *In re Orrell Colliery and Fire-Brick Co.* (1879), 12 Ch.D. 681; *Magnus v. National Bank of Scotland* (1888), 36 W.R. 602.

W. N. Tilley, K.C., and *G. L. Smith*, for the defendants, respondents. The action has been rightly stayed as being frivolous and vexatious under Rule 124: *Stephenson v. Garnett*, [1898] 1 Q.B. 677; *Reichel v. Magrath* (1889), 14 App. Cas. 665. The claim in the action which came on for trial at Brockville covered all that is asked in this: Halsbury's Laws of England, vol. 13, p. 333; *Macdougall v. Knight* (1890), 25 Q.B.D. 1. The costs in the previous actions have not been paid. Instead of bringing another action, the plaintiff should have moved for relief under Rule 523.*

Grant, in reply. The institution of a new action, instead of a motion under Rule 523, was the better practice, though the latter course was also open to the plaintiff.

September 28. RIDDELL, J.:—The plaintiff, now a miner, was, more than twenty years ago, a produce-dealer, etc., at Prescott, and had dealings with the defendants.

*523. A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation or to any further or other relief than that originally awarded, may move in the action for the relief claimed.

In 1895, he brought an action against them, alleging that in 1892, 1893, and 1894 he sold hay in Britain, and in connection therewith he made drafts on persons in England which, with cash cabled, he placed in the bank. He says that the defendants owe him on that account \$873.57 and interest \$104.82, in all \$978.39—he gives some 7½ foolscap pages of particulars.

(2) Then he sets out that some of the drafts were returned unpaid, and that the bank overcharged him \$592.04, which, with interest \$71.06, amounts to \$663.10, and he gives a page and a half of items.

(3) The next claim is \$196.25 for expenses of one Ramsay improperly charged \$ 8.50 for a telegraph account
improperly charged and 4.75 for a cable account

in all \$209.50 which with
28.30 interest amounts to

\$237.86.

(4) The bank agreed to charge only 6 per cent. on loans and discounts, but overcharged him \$549.51, and this, with \$54.95 for interest, amounts to \$604.46—some 13 pages of items are given, about 700 in all.

(5) He next charges negligence on the part of the bank in connection with a potato transaction with a New York firm; and claims \$5,516.26 and \$1,489.36 interest, \$7,005.62 in all, on that account.

(6) Then negligence in a potato transaction with one Leroux, for which he claims \$154.25 and interest \$53.20, in all \$207.45.

(7) Overcharge of interest on demand loans and interest thereon, \$1,124.62.

(8) Refusal to implement an agreement to furnish the plaintiff with sufficient funds, for which \$5,000 damages are claimed.

(9) Refusal to sell or allow the plaintiff to sell certain notes lodged with the bank on a warehouse receipt, to the damage of the plaintiff of \$4,320.

(10) "The plaintiff is entitled to an account from the defendants of his dealings with them and charges that they have been guilty of fraud and deceit in dealing with him."

The prayer is for the nine sums above mentioned, and "to

App. Div.
1917

SMITH
v.
MERCHANTS
BANK OF
CANADA.

Riddell, J

App. Div.
1917

SMITH
v.

MERCHANTS
BANK OF
CANADA.

Ridde II, J.

have an account taken of all dealings and transactions between the plaintiff and defendants for the past six years; to have any stated or settled account . . . opened up; to have any securities . . . delivered up on payment of any balance . . .; and to have paid to the plaintiff by the defendants any balance which may, on a proper taking of the accounts, be found due by the defendants to the plaintiff." A prayer for general relief follows.

The defendants, denying all charges of impropriety, set up that accounts had been stated from time to time, and that the defendants, on the faith of them, had made further advances, that there had been frequent statements of account, etc.; and they counterclaimed on notes and a judgment.

The case came on for trial before the late Mr. Justice Rose, at Brockville, in April, 1897. Before us, Mr. Grant stated that the decision was not on the merits, but by default of the plaintiff, as his counsel had not arrived. This would of course make no difference: *In re Orrell Colliery and Fire-Brick Co.*, 12 Ch.D. 681, 28 W.R. 145; *Ker v. Williams* (1885), 29 Sol. J. 681; *Armour v. Bate*, [1891] 2 Q.B. 233; but we sent for the trial Judge's note-book, and from that it appears that the action was tried out for parts of two days, counsel appearing for both parties and evidence called on both sides.

The learned trial Judge gave judgment for the plaintiff for \$58 and \$5 costs, and for the defendants for \$18,877.74 and \$595.71 costs, and judgment was entered accordingly and not moved against—there is still an amount over \$10,000 unpaid on this judgment.

In 1913, the plaintiff brought an action for substantially the same causes of action as in the present action, in the Superior Court, Montreal; but that action was dismissed for want of complying with an order for security for costs.

In June, 1916, the plaintiff began an action in the Supreme Court of Ontario for the same causes of action; an order for security for costs was made, but not complied with; whereupon the action was dismissed with costs.

In February, 1917, the present action was brought for the same causes of action as the Montreal action and that of June, 1916, in this Court: upon application of the defendants for an

"order staying this action, on the ground that the case is frivolous and vexatious and an abuse of the process of the Court," my brother Masten ordered that the action should be perpetually stayed. The plaintiff now appeals.

It would seem that a dismissal of the action for want of complying with an order for security for costs is not a bar to another action for the same cause: Seton's Forms of Judgments and Orders, 7th ed., vol. 1, pp. 134, 136; *In re Orrell Colliery and Fire-Brick Co.*, 12 Ch.D. 681, 28 W.R. 145; *In re Riddell* (1888), 20 Q.B.D. 512, at p. 518, *per* Lopes, L.J.; *cf. Magnus v. National Bank of Scotland*, 36 W.R. 602, 57 L.J. Ch. 902; M. W. & S. Annual Practice (White Book), 1917, pp. 1928, 1929; but that the Court has inherent power to stay the second action until the costs of the preceding action are paid—and certainly the plaintiff should not in any case be allowed to proceed here until he has paid the costs of the previous actions.

We must now examine the claim in the present action to see how far it is concluded by the judgment of April, 1897.

The claim here sets out that the plaintiff implicitly trusted the manager of the bank, one Jemmett, and that, through the fraud of Jemmett, he was defrauded of about \$200,000, the fraud and deceit being discovered by the plaintiff only "shortly before the commencement of this action"—and proceeds to give particulars.

(1) Para. 9. He was in 1893 and 1894 charged up with notes and acceptances \$266,412, whereas "he was credited with the proceeds of notes and acceptances discounted to the extent of \$194,536.60, by which means the defendant, through its said manager, unlawfully took from the plaintiff by deceit and fraud the sum of \$71,875.00 and other large amounts." This clearly means taking an account which was refused in 1897.

(2) Para. 10. March 28, 1893, Jemmett by fraud procured from the plaintiff four promissory notes of that date for \$600, \$1,000, \$800, and \$1,000, for which no credit was given, although they were all charged against the plaintiff with interest. These do not appear in the previous action.

(3) Paras. 11, 12, 13, 14. The plaintiff discounted two sterling drafts for £595 and £488 respectively with the bank; they were not accepted in Liverpool; the plaintiff gave his own note for \$5,200 to cover them; but the bank charged him also with the sterling drafts—this does not appear previously.

App. Div.

1917

SMITH

v.

MERCHANTS
BANK OF
CANADA.

Riddell, J.

App. Div.
1917

SMITH
v.

MERCHANTS
BANK OF
CANADA.

Riddell, J.

(4) Para. 15. Two drafts for \$238.10 and \$311.80 were paid by the drawee, but the plaintiff was not credited with the proceeds—this is new.

(5) Para. 16. A cheque for \$3,140.55 was obtained by the bank, payable to "Hay Reductions or Bearer," but the bank gave no credit for the cheque. It being on the bank itself, it is hard to see why the bank should give credit for it—it was only a voucher. If it be intended to charge that it should have been taken into account as balanced by remittances on hay account, etc., this means taking an account.

(5) Para. 17. A note for \$1,290 by the plaintiff is charged to him, but he receives no credit for it—this is new.

(6) Para. 18. A note for \$1,048 is charged against the plaintiff, but he receives no credit for it—this is new.

(7) Para. 19. Another note for \$520 is nearly in the same case—it is charged against him in full, although he paid \$420 upon it—this is new.

(8) Para. 20. A note for \$1,135.24 was paid by cheque, but the bank subsequently obtained a cheque covering this note and another of \$1,900, no credit being given—this is new.

(9) Para. 21. A note for \$534.09 was paid, but the bank obtained a cheque for \$536.24 for it, which they charged up to the plaintiff—this is new.

(10) Paras. 22, 23. Underwood drafts in the hay transaction were fully gone into at the Brockville trial, but it is claimed that the facts were concealed.

(11) Para. 24. A sum of \$2,970 was charged against the plaintiff twice—this is new.

(12) Para. 25. A sum of \$2,193.45 was wrongly charged against the plaintiff, the bank pretending to have discounted a bill of lading to that amount—this is new.

(13) Para. 26. A note for \$1,600 charged against the plaintiff, but he received no credit for it from the bank—this is new.

(14) Para. 27. Four notes amounting to \$1,010.70 are charged against the plaintiff, but he receives no credit for them—this is new.

(15) Para. 29. The bank received \$5,532.50 on a bill of lading, but gave no credit for it—this is new.

(16) Para. 30. A note for \$1,000 charged but not credited—this is new.

(17) Para. 31. A sum of \$554.97 charged the plaintiff by the bank for two bills of lading not discounted by the bank—this is new.

(18) Para. 32. A sum of \$1,570.14 charged the plaintiff by the bank for four bills of lading not discounted—this is new.

(19) Para. 33. A note for \$800 not credited, but charged against the plaintiff's account—this is new.

(20) Para. 34. Another sum of \$1,008.95 charged the same way—this is new.

(21) Para. 35. Seven drafts in November and December, 1893, on England, were not credited to the plaintiff, but charged against him—these drafts, with bills of lading attached, were taken possession of by the bank, the goods sold, but the proceeds not credited to the plaintiff—these particular bills of exchange are not mentioned in the previous action.

(22) Para. 36. A draft on England for £150 charged but not credited—this is new.

(23) Para. 37. Another for £160, also new.

(24) Para. 38. A specific sum of \$1,021.70 detained—this is new.

(25) Para. 39. A draft on Montreal for \$387 was paid by drawee, but the plaintiff forced to pay it again to the bank—this is new.

(26) Para. 40. A note for \$1,790 charged but not credited—this is new.

(27) Para. 41. Another for \$600—also new.

(28) Para. 42. And another for \$800—also new.

(29) Para. 43. A specific sum of \$623.88 received by the bank in three sterling drafts, but not credited—none of these is mentioned in the former action.

(30) Para. 44. Two notes for \$800 and \$1,000 charged but not credited—this is new.

(40) Para. 45. Another for \$900—also new.

(41) Para. 46. Two others for \$700 and \$1,200—new.

(42) Para. 47. Others amounting to \$6,520—new.

(43) Para. 48. Others amounting to \$2,513—new.

(44) Para. 49. Another for \$8,425—new.

(45) Para. 50. \$9,187.30 received by the bank from English drafts and not credited—this is not specifically dealt with in the former action.

App. Div.

1917

SMITH

v.

MERCHANTS
BANK OF
CANADA.

Riddell, J.

App. Div.

1917

SMITH

v.

MERCHANTS

BANK OF

CANADA.

Riddell, J.

The plaintiff claims these several sums, also \$200,000 damages for fraud, "an accounting by the defendants of their dealings with the moneys of the plaintiff," and general relief.

It will be seen that all but the first claim and the corresponding claim for an account are new, at least in form, and have not been specifically disposed of by the Brockville judgment—there is no *res adjudicata* apparent concerning them: of course the defendants can, if so advised, plead *res adjudicata* also to these, and the question may be then determined.

As to the relief denied in the former action, it was open to the plaintiff to move to impeach the judgment on the ground of fraud subsequently discovered, under Rule 523, but he was not bound to do so—he might proceed by way of action: *Leeming v. Armitage* (1899), 18 P.R. 486; *Wyatt v. Palmer*, [1899] 2 Q.B. 106; *Cole v. Langford*, [1898] 2 Q.B. 36.

I think he has pursued the proper course; it is open to the defendants, if so advised, to plead *res adjudicata*; and then the plaintiff may amend by setting up fraud and claiming to have the former judgment set aside *pro tanto*.

I would allow the appeal and allow the plaintiff to proceed, on paying the costs of the former actions in Montreal and in this Court in 1916, being allowed to set off the costs of these proceedings here and before my brother Masten.

The plaintiff may amend as advised—nothing in this judgment is a final decision as to what was decided at the Brockville trial.

MAGEE, J.A., and ROSE, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P. (dissenting):—The learned Judge, whose order, staying all further proceedings in this action, is now appealed against, after giving careful consideration to all the facts and circumstances of this case, aided by his large experience in applying the law relating to banks and banking to such everyday transactions as are said to be involved in this action, came to the conclusion: that, if there ever were a case in which the inherent power of this Court to prevent an abuse of its process, or the expressed power conferred upon it, in Rule 124, to stay or dismiss an action upon its being shewn to be vexatious or frivolous, should be exercised, this case is such an one: and, after a careful perusal

of all the writings now before us upon this appeal, and an application of my knowledge gained by long experience, in dealing with cases in which the minor, litigious, mania has been displayed, to all the facts of this case, my conclusion is quite in accord with that of the Judge of first instance, and goes this much further than anything expressed by him: that not only the public interests, but the interests of the plaintiff himself, demand that an end be put to this persistent, futile, and senseless litigation, which he has been carrying on, spasmodically, for nearly 25 years: to that extent which seems to me to be very like making a farce of the proceedings of the Court.

Effectually to end such proceedings, however summarily that may be done, in no sense detracts from the proper freedom of all men, amenable to their process, to come to the Courts of this Province for any reasonable relief to which they may consider themselves entitled: it is indeed just because of the wide open door of such Courts that it is more needful that care should be taken that that freedom should not be made use of for improper purposes: and it is quite inaccurate to speak of an order, such as that in question, as summarily snuffing out an action before it is well launched, for I know of no reason why the "snuffing out" may not be the subject of an appeal to the highest tribunal, as this appeal proves it may be to the highest in this Province.

A quarter of a century ago, the defendants and plaintiff were bankers and customer: the plaintiff was a dealer in farm-produce, as many thousands of such customers are, and carried on business in one of the smaller towns of this Province, having his banking account in the agency of the defendants at that town: and nearly that length of time ago, the plaintiff seems to have been in financial difficulties, to have been all the while, and to be yet, what is commonly called "execution-proof;" so much so that the defendants long since ceased to renew their executions against him upon a judgment obtained against him 20 years ago: and have been unable yet to recover any costs of two actions, similar to this, which were dismissed, one in a Quebec Court and one in this Court.

More than 21 years ago, the parties' business connection, as bankers and customer, having come to an end because of the customer's inability to pay his debts, the plaintiff brought an

App. Div.
1917
SMITH
v.
MERCHANTS
BANK OF
CANADA.
Meredith,
C.J.C.P.

App. Div.
1917

SMITH
v.

MERCHANTS
BANK OF
CANADA.

Meredith,
C.J.C.P.

action, in this Court as it then was, for an account of all dealings and transactions between the defendants and him, and to open up stated or settled accounts, and for payment "of any balance due by either party;" and for damages for neglect or refusal to sell goods of the plaintiff, for overcharge of interest, and for insufficient credit on exchange transactions: and in that action, as in this, the defendants were charged with "fraud and deceit."

The claim in that action plainly covered all that can be claimed in this; it cannot make any difference, in that respect, that in these days the amount of the claims has jumped from thousands to hundreds of thousands of dollars: but it does make quite a difference in another aspect of the case.

That action came on for trial and was tried in the month of April, 1897, a little more than 20 years ago. Instead of the usual reference to a Master of the Court to take the account being directed, the whole case was tried by the presiding Judge, and was gone into as fully as the plaintiff desired, with the result that the defendants were found to be indebted to the plaintiff in the sum of \$58, upon his claim in the action; and that he was indebted to them, upon their counterclaim in the action, in the sum of \$18,877.74; and he was awarded \$5 for costs against them, and they \$597.71 for costs against him.

There was no kind of reservation of any further right of action in respect of any matter involved in this action: that trial and the result of it was, or should have been, final and conclusive in respect of all such matters: and, for the purposes of this motion, should be so treated, in whatever form judgment, in the action, may have been entered up. There would be no kind of finality to litigation if that were not so. The accounts were taken, and the result was as I have mentioned. How then can they now be reopened, except after a successful attack upon that judgment on the ground that it was obtained by fraud, of which there is no allegation, nor a tittle of evidence? So, too, as to all other claims made in that action—if the plaintiff failed to prove them, they should have been and actually were dismissed. And so the parties were left in April, 1897.

It may be well now to refer to some of the subsequent litigation, which aids me, with the knowledge before referred to, to reach easily the conclusion I have come to regarding the true character

of the litigation now in question; and which litigation is in part the ground upon which the defendants' solicitor, upon oath, has charged the plaintiff with instituting this action in pursuance of a policy of harassing and annoying the defendants; a charge which the plaintiff has not seen fit to deny in his affidavit filed upon this motion: nor, I may add, has he attempted to verify on oath any part of his claim in this action, or account for his 20 years' lethargy.

In November, 1897, an action was brought by a creditor of the plaintiff, suing on behalf of himself and other like creditors, against these defendants, in respect of thirteen transactions between the parties to this action, and was tried and dismissed: the judgment at the trial is reported: see *Conn v. Smith* (1897), 28 O.R. 629.

In the year 1907, in actions of *Smith v. Steel and these bankers*, and *Steel v. Smith and them*, claims such as those now in question were raised, but were dismissed.

In the year 1911, in an action brought by one Webb on behalf of all the creditors of this plaintiff, these defendants proved their claim against him at \$10,218.57, and were paid a small dividend upon it.

In the year 1895, the defendants sued this plaintiff and others upon a promissory note, and sought to have a transfer of property, made by one of the defendants to another, set aside: and were successful in the action.

In the year 1896, these defendants sued an endorser of a note, in their favour, made by this plaintiff; and the defence was, that this plaintiff was not indebted to these defendants upon the taking of all accounts between them as customer and bankers: the defendant was required to give particulars, and did so, such particulars covering 27 pages of type-written foolscap, which particulars, in detail, seem to be very much, if not altogether, the same as the particulars of the claim made in this action. The defence failed; the plaintiffs had judgment for their claim in the action.

In the year 1913, this plaintiff brought an action, in a Quebec Court, admittedly the same as this, against these defendants, claiming \$800,000 damages; the action was dismissed for disobedience of an order for security for costs. And, in the year 1916, he brought a similar action in this Court against them, which also was dismissed for the same cause as the dismissal of the Quebec action.

App. Div.
1917

SMITH
v.

MERCHANTS
BANK OF
CANADA.

Meredith,
C.J.C.P.

App. Div.
1917
SMITH
v.
MERCHANTS
BANK OF
CANADA.
Meredith,
C.J.C.P.

There is no evidence as to the effect of such a dismissal of an action in the Quebec Court; nor has the effect of it in this Court, under Rule 376, been discussed. If it be only to enable the plaintiff to begin a new action, at any time he may see fit to do so, the Rules do not seem to have helped a defendant very much.

No costs have been paid, of either of these actions: and the plaintiff is also a judgment debtor of the defendants, and has been for 20 years, in upwards of \$10,000.

Besides these actions, the plaintiff has on several occasions applied for a fiat to enable him to sue the defendants for penalties under the Bank Act, but has always been refused any assistance.

In these circumstances, what other conclusion could the learned Judge have come to than that this litigation is vexatious, extremely vexatious, and inexcusable?

And to these circumstances must be added these: that the plaintiff's claim is against a most reputable institution, charging them with, as the plaintiff's solicitor put it in a letter written to the defendants or to one of their directors, "stealing" from the plaintiff, a quarter of a century or so ago; a claim made now, when it must be difficult for the defendants, if not impossible, to prove all that they could have proved if the reckless charges now made had been tried promptly: made after the death of the plaintiff's agent through whom the transactions between the parties took place: it may be easy for the plaintiff to make such charges against a dead man, but I cannot characterise them in any other word than shameless.

And yet another circumstance I cannot pass over. These extracts I take from letters written at the plaintiff's instance before this last of the long line of actions was begun: "Dear Mr. Long:—*Re Edward Smith v. Merchants Bank of Canada*. We enclose you herewith, as local director of the Merchants Bank, a copy of a letter which we are sending to the bank. We thought it might be of interest to you and also thought that possibly you might be interested enough in the matter to drop in and see the evidence which we have and which we propose to submit in the action referred to if some settlement is not made. You will quite appreciate that occupying the position which we think we occupy towards several institutions engaged in banking, etc., we do not want to be the means of causing injury to any bank unnecessarily, and for that reason we are prepared to give the

bank every chance to investigate this matter before taking action." And this from a like letter to the defendants' general manager: "We should be sorry to injure your bank in any way by issuing a writ for this large sum and by making public the method in which a customer of yours was treated by your bank, and for that reason we are willing to give you every facility for investigating the matter before a writ is issued, provided you are ready to act promptly."

If this sort of thing can go on for a quarter of a century, where is it to end, as long as solicitors can be retained to bring new actions? A state of affairs which may require much firmness, and considerable means in the persecuted, to resist a purchase for peace's sake only.

It may be that the plaintiff is what is commonly called "obsessed" with an idea that he was robbed by the defendants a quarter of a century ago, and that he has really legal claims upon the defendant, varying in amount from thousands of dollars to nearly a million, the variation depending upon the extent, at the time, of the mania, for no one can call his claim for \$800,000 anything but an insane one. Experience has taught most of us that litigants sometimes have such delusions, and indeed commonly greatly exaggerated notions of their rights: and experience seems to have made it needful to pass legislation in England to curb such litigious notions and persons: see the Vexatious Actions Act, 1896.

The rule is that the interests of the public—and I may add of the parties too—requires that there should be a limit to litigation; a rule in accord with which are all the statutes of limitations; and a rule which has been quite too often violated in regard to the matters in question in this action.

Nor, must it be overlooked that the plaintiff's claim is one in regard to simple debts, in connection with his own business, of which he had, or should have had, the most knowledge; and so debts which, if they ever existed, have long since been barred by the Statute of Limitations.

Whatever may be the real purpose or cause of these extraordinary litigious outbreaks of the plaintiff, it is quite time to bring them firmly to an end.

I would dismiss the appeal.

Appeal allowed; MEREDITH, C.J.C.P., dissenting.

App. Div.

1917

SMITH

v.

MERCHANTS
BANK OF
CANADA.

Meredith,
C.J.C.P.

1917

[APPELLATE DIVISION.]

May 10.
Sept. 28.

RAT PORTAGE LUMBER CO. v. HARTY.

Attachment of Debts—Moneys Payable to Judgment Debtor by Railway Company—Assignment to Bank—Security for Indebtedness of Judgment Debtor (Customer) to Bank—Attaching Order Served upon Railway Company and Bank—Validity of Assignment—Absence of Fraud and Insolvency—State of Accounts between Bank and Customer at Time of Service—No Sum Due to Customer—Possible Subsequent Indebtedness—Apparent Surplus—Unascertained Amount—Property in Debt Attached—Execution in Hands of Sheriff Binding Goods of Judgment Debtor—Knowledge of Bank—Execution Act, secs. 10, 20.

H., a customer of a bank, had contracts with a railway company, by which he was to cut and deliver to the company, by the 15th May, 1916, certain piling, for which he was to be paid a specified price per foot. On the 19th July, 1916, he assigned to the bank, as security for all his existing or future indebtedness to the bank, all the moneys due or that might become due to him from the railway company under the contracts. The plaintiffs, who had a judgment against H. and execution in the sheriff's hands, obtained, on the 14th December, 1916, an order attaching all debts owing or accruing due from the railway company and the bank to H., and served the order on both garnishees:—

Held (MEREDITH, C.J.C.P., dissenting), that an application for payment to the judgment creditors of an unascertained sum said to be due by the bank to H. was properly dismissed.

Per RIDDELL and ROSE, JJ.:—It was clear upon the evidence that, neither on the day of the service of the attaching order (which was really the crucial date), nor on the day of the hearing of the motion for payment over (a day earlier than the 22nd February, 1917), did the bank owe any money to H.; and when, at a later date, the bank received from the railway company a sum in excess of H.'s indebtedness to the bank, the bank had in their hands directions from H. (given, it was true, after the service of the attaching order) to pay the excess to persons to whom H. professed to owe it for services in connection with the cutting and delivering of the piling. If the affidavit upon which the attaching order was obtained had correctly stated the facts, it would have said that H. was indebted to the bank and that the bank held security for their claim, not that the bank were indebted to the judgment debtor. When the true state of facts afterwards appeared, the attaching order should have been rescinded, for, upon those facts, the case was not brought within Rule 590. If, at the time of the service of the attaching order, the bank had owed H. any sum, an order for payment over might have been made, notwithstanding that the exact amount of the bank's indebtedness remained to be ascertained; but an attaching order cannot be made upon proof that if things go well the garnishee will become indebted to the judgment debtor.

Boyd v. Haynes (1869), 5 P.R. 15, *Gilroy v. Conn* (1912), 3 O.W.N. 732, and *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499, referred to.

When the bank received payment from the railway company, the bank did not in any sense receive money belonging to the plaintiffs or money impressed with any trust in favour of the plaintiffs—the attaching order does not transfer to the garnishor any property in the debt attached; the bank were not liable by reason of their taking the money from the railway company with knowledge that it had been attached in the hands of the railway company.

Per MEREDITH, C.J.C.P.:—The tendency of the Courts should be, not to narrow, but to widen as much as possible, the usefulness of garnishee proceedings: *Hollinshead v. Hazleton*, [1916] 1 A.C. 428, and *O'Driscoll v. Manchester Insurance Committee*, *supra*.

As no question of fraud or insolvency was raised, the money was not attachable in the hands of the railway company, for under the assignment they

were bound to pay it over to the bank; and, unless it was attachable, or could be otherwise reached, in the hands of the bank, it was not attachable, and could not be reached, at all. At all times after the assignment, the bank were under a legal obligation to get in the money and pay the balance to H. When the garnishee order was served, the money was payable to the bank, and the bank had already received more than \$1,000 of it; there was no uncertainty regarding it or the amount of it: it was money coming to H., and none the less accruing to him because it had to pass through the bank's hands before he should receive it; and it was attachable in garnishee proceedings, though no order for payment over could be made until the money had come to the hands of the garnishees. The bank were at all times liable to account to H. and to pay over the surplus of the moneys received so soon as it was ascertained on such an accounting; and, before the order refusing to direct payment over was made—on the 2nd April, 1917—the bank had received all that was due and payable to them under the assignment; and there was apparently a surplus in their hands, after payment of all their claims against H., of over \$1,300. This money of H., so in the hands of the bank—subject to prior charges upon it, if any—should have been ordered to be paid over to the judgment creditors in the garnishee proceedings. The money was H.'s, and was subject to the garnishors' writ of execution, which was, to the knowledge of the bank, in the hands of the sheriff in full force and virtue, binding the money, in whatever shape it was, as well as all other the goods and lands of H. in the sheriff's bailiwick: see secs. 10 and 20 of the Execution Act, R.S.O. 1914, ch. 80.

1917
—
RAT
PORTAGE
LUMBER
Co.
v.
HARTY.

APPEAL by the plaintiffs (judgment creditors) from an order of the Local Judge at Fort Frances refusing to direct payment over to the plaintiffs of a fund in the hands of the Canadian Bank of Commerce, garnishees, but directing the garnishees to pay the money into Court to abide further order.

April 27. The appeal was heard by MASTEN, J., in Chambers.

R. T. Harding, for the appellants.

A. A. Macdonald, for the Canadian Bank of Commerce.

May 10. MASTEN, J.:—On the hearing of this motion, as the bank admitted \$144.90 to have been in their hands to the credit of James Harty's collateral account at the date of service of the attaching order in December, 1916, and as this sum was not required for the satisfaction of Harty's note then current in the bank, and still remains to his credit, I thought the motion was governed by *Sparkes v. Younge* (1858), 8 Ir. C.L.R. 251—but further consideration has convinced me that the principle to be applied is that illustrated by *Hutt v. Shaw* (1887), 3 Times L.R. 354.

On the question of costs—awarded by the Local Judge—I do not see my way to interfere.

The appeal is dismissed with costs.

The plaintiffs appealed from the order of MASTEN, J.

App. Div.
1917
RAT
PORTAGE
LUMBER
Co.
v.
HARTY.

June 6 and 7. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. T. Harding, for the appellants. If the order in appeal stands, it will leave the door open for the nullification of garnishee proceedings against a judgment debtor, by the simple expedient of the debtor assigning his debt. Rule 590 provides for the attaching of all debts "owing or accruing" from the garnishee to the judgment debtor. At the date of the service of the attaching order upon the bank, there was a large sum owing by the bank to Harty, namely, the money then and for a long time previously owing by the Canadian Northern Railway Company, which money had been assigned to the bank by Harty. If the bank had not got this money into their hands at the date of the attaching order, they should have done so, and the money was no less subject to attachment because the bank neglected their duty to get it in, by suit or otherwise: *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499. At all events, the money in the hands of the railway company was attached, and the bank, knowing this, had no right to take this money except to hold it subject to the garnishee order.

Frank Denton, K.C., and *A. A. Macdonald*, for the bank, respondents. Neither at the date of the service of the attaching order nor on the day of the hearing of the application for payment was there an attachable debt owing by the bank to Harty. At the date of the service of the attaching order, there may have been a debt owing from the railway company to Harty, but the money for the payment of it had not reached the bank; and it is not the law that money which may come into the hands of a garnishee at a future time, only in the event of everything going well, is attachable: *Webb v. Stenton* (1883), 11 Q.B.D. 518; *Fellows v. Thornton* (1884), 14 Q.B.D. 335; *Boyd v. Haynes* (1869), 5 P.R. 15; *Holmsted's Judicature Act*, 4th ed., p. 1209; *Chatterton v. Watney* (1881), 16 Ch. D. 378; *Central Bank of Canada v. Ellis* (1893), 20 A.R. 364. As to the contention that the bank held the money from the railway company subject to the garnishee order, the only question here is, whether, at the time of the service of the attaching order, the bank were indebted to Harty.

Harding, in reply.

September 28. ROSE, J.:—This is an appeal by the Rat Portage Lumber Company, judgment creditors of James Harty, against the order of Masten, J., in Chambers, dismissing an appeal by the judgment creditors from an order of the Local Judge at Fort Frances, in Chambers, which dismissed, save as to a sum of \$13.60, an application by the appellants for an order that one of the garnishees, the Canadian Bank of Commerce, do pay over a larger sum alleged to be due by the bank to Harty.

Harty, who was a customer of the bank, had contracts, dated the 15th February and 6th January, 1916, with the Canadian Northern Railway Company, by which he was to cut and deliver to the railway company, by the 15th May, 1916, certain specified piling, for which he was to be paid a specified price per foot. By an assignment, dated the 19th July, 1916, he assigned to the bank, as security for all his existing or future indebtedness and liability to the bank, all the debts, accounts, and moneys, due or accruing due or that might at any time thereafter be due to him under those contracts, and also "all contracts, securities, bills, notes, and other documents" held by him "in respect of the said debts, accounts, moneys, or any part thereof." This assignment was sent by the bank to the railway company, and on the 9th August, 1916, the treasurer of the railway company wrote to the bank that certain interests of another bank under a previous assignment had ceased, and said: "It will now be in order for me to accept your assignment, and we are making notation on our records accordingly." On the 27th November, 1916, Harty wrote to the bank saying that he expected the railway company to make payment within the next few days, and asking the bank, after deducting what was due them for advances, to credit the remainder to the "James Harty special account," as he had payments to make in getting out the piling, and wished the money kept apart.

On the 14th December, 1916, the judgment creditors obtained an order attaching all debts owing or accruing due from the garnishees, the railway company and the bank, to Harty. The date fixed by the order for the attendance of the garnishees before the Judge was the 28th December.

On the 28th December, the local manager of the bank made affidavit that the bank were not, at the time of the service of the

App. Div.
1917
—
RAT
PORTAGE
LUMBER
CO.
v.
HARTY.
—
Rose, J.

App. Div.
1917
—
RAT
PORTAGE
LUMBER
Co.
v.
HARTY.
—
Rose, J.

garnishee order or on the day of the date of the affidavit, indebted to Harty, but that Harty was indebted to the bank in the sum of \$2,453.79 advanced on promissory notes due on the 4th January, 1917, the payment of which was secured by the assignment of the moneys above mentioned, "but the proceeds thereof havenot yet been paid to the said bank." He referred to Harty's letter of the 27th November, and added that he was informed by Harty and believed that the claims against the piling, for labour, towage, etc., would absorb any excess that might remain after payment of the bank's claim.

So far as appears, the railway company made no affidavit and gave no evidence—and no officer of the railway company was examined by the judgment creditors; but there is a letter, undated, but apparently received on the 28th December, from the railway company's solicitors to the clerk of the Court, saying: "Certain moneys are due the judgment debtor by the C.N.R., but at this date we are not able to say the exact amount, as certain accounts have to be submitted and audited. We will advise you later the exact amount attached." It does not appear that the further information thus promised was ever given.

On the 15th January, 1917, the bank-manager was cross-examined upon his affidavit. He produced the bank's ledgers containing the accounts with Harty, which shewed, as of the date of the attaching order, at the credit of the "James Harty" account \$4.63, at the credit of the "James Harty special" account \$8.97, and at the credit of the "cash collateral" account \$144.90; he gave particulars of the advances by the bank to Harty, and shewed that, if all the above-mentioned balances were applied in reduction of the amounts advanced, Harty would owe the bank something over \$2,500. He told of one payment of \$1,008.60 that had been received by the bank from the railway company on the 9th December, 1916, and had gone into the cash collateral account, and had been applied, except the \$144.90, in the reduction of Harty's indebtedness; and he also told of an interview with Harty when he had seen an informal statement, prepared, as he thought, in one of the offices of the railway company, shewing that the amount due Harty from the company, after deducting Government dues, was \$4,636.54, without taking into account the \$1,008.60 paid. His summation of the whole thing

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.

v.
HARTY.

Rose, J.

was that, if the bank received the amount that he supposed to be coming to Harty from the railway company, Harty would have a balance of \$1,302; and he said that Harty had entrusted him with cheques for payments which would dispose of that balance. Harty's instructions to him had been that these cheques were for sums due in respect of services rendered to Harty by the payees in connection with his contracts with the railway company.

Harty also was examined, but I do not think that his examination throws any light upon the matter under discussion. He was not able to say what the railway company owed him.

The date of the hearing of the motion for payment over does not appear; but it is clear that it was before the 22nd February, 1917, because on that day the Local Judge wrote a memorandum that he found that, at the date of service of the attaching order, the railway company were not indebted to Harty in any amount, and that the bank were indebted to him in the sum of \$13.60, to which sum the judgment creditor was entitled under the attaching order. The order giving effect to this opinion was not issued at once; it is said because the question of costs remained to be determined. As issued, it is dated the 2nd April, 1917. It does not contain any recital as to who were represented on the motion, or any reference to materials other than the affidavit and examinations above-mentioned, nor does it specifically deal with the claim as against the railway company: it simply directs payment of the \$13.60 found due by the bank, and provides for the costs of the bank. We are thus left without any information as to how the matter was considered as regards the railway company.

It is probable that the delay in issuing the order for payment is the cause of the subsequent motion to Masten, J., and of this appeal. After the motion had been heard by Masten, J., and, apparently, at his request, counsel for the bank handed in a memorandum in which it is said that "no change took place in any of the accounts . . . until on and after March 20th, 1917, when the bank, in good faith, acted on the order now appealed from, which, though not then actually issued, was a month old, and had not been appealed from . . . The moneys received by the bank on and after March 20th, 1917, were exhausted by the payment of the debtor's liability to the bank, and the payment

App. Div.
1917

RAT
PORTAGE
LUMBER

Co.
v.

HARTY.

Rose, J.

of woodmen's liens for wages, etc., against the fund, except the sum of \$13.60." The memorandum contains an argument that the amounts payable to discharge wage-claims were covered by the contract with the railway company, and an assertion that the bank received the money from the railway company on the latter's undertaking to pay those wages. I suppose that the argument that the amounts required to pay wages were "covered by the contract" is based upon a provision in the contract that the piling is "to be free of all charges, dues, and incumbrances." There is no evidence in support of the assertion that the bank undertook with the railway company to pay the wages; but the only evidence that the bank ever received any money from the railway company (other than the \$1,008.60 paid on the 9th December) is the admission in this memorandum, and I think it is fair that, if we accept the admission, we should accept the statement as to the undertaking also.

I think I have now referred to all the evidence before the Court except an examination of William Martin, taken on the 2nd April, 1917, not in the garnishee proceedings, but apparently in pursuance of some order, probably in a woodman's lien case. I do not quite know how this gets before us, but all the procedure in the matter has been very loose, and perhaps the examination ought to be looked at. Martin said that a few days before the 2nd April the bank paid a cheque of Harty's in his favour for \$775. As far as this examination goes, it corroborates the statement of counsel for the bank that any alteration of Harty's account with the bank took place after the 20th March.

The evidence, which I have reviewed at, perhaps, unnecessary length, makes it clear that neither on the day of the service of the attaching order, nor on the day of the hearing of the motion for an order for payment, did the bank owe any money to Harty; and that when, at a later date, the bank received from the railway company a sum in excess of Harty's indebtedness, the bank had in their hands directions from Harty (given, it is true, after the service of the attaching order) to pay the excess to persons to whom Harty professed to owe it for services in connection with the cutting and delivery of the piling.

Under these circumstances, I think the order of the Local Judge was right, except, perhaps, as to the \$13.60; but we need

not trouble about the \$13.60, for there has been no appeal against the order for its payment. What Rule 590 provides is that the judgment creditor, upon shewing upon affidavit that some person is *indebted* to the judgment debtor, may obtain an order that all *debts* owing or accruing from such third person to the judgment debtor shall be attached to answer the judgment debt and that the garnishee do *at a time named* shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor. We do not know what was stated in the judgment creditors' affidavit in this case; but it is clear that, if it had correctly stated the facts, it would have said that the judgment debtor was indebted to the bank and that the bank held security for their claim—not that the bank were indebted to the judgment debtor. If the affidavit had so stated the facts, of course the attaching order would not have been made as against the bank. It must have been made upon some misapprehension of the facts; and I think that, when the true state of facts afterwards appeared, it ought to have been rescinded. See *Boyd v. Haynes*, 5 P.R. 15. However, it was not set aside, but evidence was taken in support of the motion for an order to pay over; and that evidence shewed, as I have stated, that, even at the time of the application to compel payment, Harty continued to be indebted to the bank; so that, even if the state of affairs at the time of that application governed, and not, as I think, the state of affairs at the time of the order *nisi* (Halsbury's Laws of England, vol. 14, p. 92), the Judge was right in dismissing the application. It is true that if, at the time of the service of the attaching order, the bank had owed Harty any sum, an order for payment over might have been made, notwithstanding the fact that the exact amount of the bank's indebtedness remained to be ascertained: *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499; *Gilroy v. Conn* (1912), 3 O.W.N. 732, 2 D.L.R. 131; but I have not found any case in which it has been held that an attaching order can be made upon proof that if things go well the garnishee will become indebted to the judgment debtor.

In *O'Driscoll v. Manchester Insurance Committee*, the judgment debtor was a panel doctor, who had performed service under an agreement with the Insurance Committee, by which the whole amounts received by the committee from the National Insurance

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.

v.
HARTY.

Rose, J.

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.

v.
HARTY.

Rose, J.

Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees; the total amount available for medical benefit so received by the committee was to be the limit of their liability to the panel doctors; if the total pool was insufficient to meet all the proper charges of the panel doctors, there was to be a *pro ratâ* reduction for each doctor, or if the pool should be in excess of the amount required the balance was to be distributed among the doctors. The judgment debtor, Dr. Sweeny, had, before the service of the order nisi, on the 9th April, 1914, "completed the whole of the work for 1913 necessary to entitle him to payment for his services for that year. He had received payments on account, but it would be some time before the accounts were settled and the balance due to him for 1913 ascertained. There was, however, no contingency which could happen to deprive him of his right to payment on the figures being finally adjusted . . . The Insurance Committee were kept in funds for making the necessary payments . . . and when they received all the funds for the year they would be in a position to determine the amount payable to each doctor." Then as to the first quarter of 1914, Dr. Sweeny had completed his services and had become entitled to payment on account for work done, and that right was not subject to be divested by any contingency. Swinfen Eady, L.J., from whose statement of the facts (pp. 511, 512) I have quoted, distinguished the case from those cases in which "the attempt has been made to attach income arising from a fund vested in trustees for a *cestui que trust*. In such a case," says the learned Lord Justice (p. 513), "until the trustees receive the income there is no debt owing or accruing from the trustees to the *cestui que trust*, and consequently there is nothing which can be attached to answer a judgment obtained against the *cestui que trust*. That consideration does not apply to the present case because it is admitted that the Insurance Committee had at all material times ample funds in their hands for the purpose of paying what might be found due to Dr. Sweeny." Bankes, L.J., drew the same distinction. He said (pp. 516, 517): "It is well established that 'debts owing or accruing' include debts *debita in præsentì solvenda in futuro*. The matter is well put in the Annual Practice, 1915, p. 808: 'But the distinction must be borne in mind between the case where there is an ex-

isting debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not.' If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not shew that there is no debt."

Now the case before us seems to be much more like the trustee cases referred to by Swinfen Eady, L.J., than like the *O'Driscoll* case: see *Webb v. Stenton*, 11 Q.B.D. 518; *Fellows v. Thornton*, 14 Q.B.D. 335. The state of affairs when the attaching order was served was that, if Harty had earned from the railway company more than the amount of the bank's claim against him, and if the railway company did pay the bank, the bank would become indebted to Harty; but the receipt by the bank of the money and the consequent liability of the bank to Harty were, it seems to me, contingencies such as *Bankes, L.J.*, refers to, and not a certainty such as existed in the case of *Dr. Sweeny's* claim against the Insurance Committee. See also *Chatterton v. Watney*, 16 Ch. D. 378.

Then it is said that, even if the case as against the bank be as I have put it, the bank are liable because the money in the hands of the railway company was attached, and the bank took the money with knowledge of the attachment. Even if the bank did come under some liability by reason of the receipt of the money, I do not see how that liability can be enforced upon this appeal, in which we are concerned only with the question whether the bank were indebted at the time of the attachment. But, apart from that consideration, I do not think the claim is established. Even under the English Rule which declares that the attaching order shall "bind the debt" in the hands of the garnishee, the order does not transfer to the garnishor any property in the debt attached: what it does is to enable the garnishor to compel the garnishee to pay an amount equal to the original debt: *In re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99; *Norton v. Yates*, [1906] 1 K.B. 112. Therefore, when the bank received payment from the railway company, the bank did not in any sense receive money belonging to the plaintiffs or money impressed with any trust in favour of the plaintiffs; and

App. Div.
1917
RAT
PORTAGE
LUMBER
Co.
v.
HARTY.
Rose, J.

App. Div.
1917
—
RAT
PORTAGE
LUMBER
Co.
v.
HARTY.
—
Rose, J.

this is so even if the learned Local Judge was wrong in holding that the railway company were not indebted to the plaintiffs at the date of the service of the attaching order. I do not suggest that there is any error in his judgment as regards the railway company. There is no appeal before us against that part of the judgment, and we do not even know upon what it was based. It may have been upon the ground that, as between the attaching creditor and the bank, the bank as assignees were entitled, at all events to the extent of their claim: *Glegg v. Bromley*, [1912] 3 K.B. 474; but, as I have said, we are not concerned with that question, but only with the propriety of the order as regards the bank.

I would dismiss the appeal with costs.

RIDDELL, J., agreed with ROSE, J.

LENNOX, J.:—I think the appeal should be dismissed with costs.

MEREDITH, C.J.C.P. (dissenting):—Upon the argument of this appeal I was in favour of allowing it and ordering payment by the garnishees to the judgment creditors, of such amount, if any, as should be found, upon a reference, to have been properly applicable to the payment of the judgment debt; but some of my learned brothers thought that there might be some legal obstacle in the way of the judgment creditors that might prevent justice being done between the parties, and so we retained the case for further consideration; a consideration which, I am glad to be able to say, has convinced me that there is no such real obstacle.

Although the proceedings before the local Judge tended more to obscure than make plain the facts of the case, it is really a simple one, in which there can be no controversy as to the material facts affecting the question of liability, though the facts affecting the amount of such liability have been left in a deplorable state of uncertainty, rendering a reference to ascertain that amount unavoidable, if it is to be ascertained.

What the respondents ask us to do really is, to give a ruling which will advertise a simple means by which a just and useful means of enforcing payment of just debts—garnishee proceedings—can be very largely thwarted and rendered quite ineffectual.

That, it need hardly be said, should not be done if there be any proper means of avoiding it. Public interests require that debtors should be compelled to pay their just debts; and that the Courts should give full effect to all the means which the law provides for that purpose—and, emphatically, that technicalities, and unsubstantial obstacles of all kinds, should be brushed aside. The tendency of the Courts should be, not to narrow, but to widen as much as possible, the usefulness of garnishee proceedings: see *Hollinshead v. Hazleton*, [1916] 1 A.C. 428; and *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499.

These few indisputable facts govern the whole question of liability:—

The garnishee orders were obtained against, and served upon, both the respondents in this appeal and the Canadian Northern Railway Company, on the 14th December, 1916.

At that time, and for a long time before, the railway company had been indebted to the judgment debtor in the sum of a little more than \$4,600; out of which they had, on the 9th December, 1916, paid to the respondents the sum of a little more than \$1,000, leaving a balance still due, on that account, of a little more than \$3,600.

This sum was not only due but was payable and about to be paid, the delay in payment being occasioned only so that the usual formality in dealing with and paying such accounts, in the railway company's method of carrying on their business, might be observed. They could have been sued for the amount due long before that day. The respondents were bankers of the judgment debtor, and he had, on the 19th July, 1916, assigned to them, as security to them for his existing and future indebtedness to them, all his claims against the railway company in respect of their indebtedness to him before mentioned.

Notice of this assignment, in writing, was given to the railway company, and was accepted by them and noted in their books on the 9th August, 1916.

The sum of a little more than \$1,000, before mentioned, was paid by the railway company to the respondents as such assignees of the judgment debtor.

As there was sure, at all times, to be a large balance, payable to the judgment debtor, out of these moneys, and as they were

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.

v.
HARTY.

Meredith,
C.J.C.P.

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.

v.
HARTY.

Meredith,
C.J.C.P.

then about to be paid over by the railway company to the respondents under that assignment, the judgment debtor, on the 27th November, 1916, gave instructions to the respondents to place that balance to his credit in their bank, in a special account in his name, as he had payments to make on account of the work done out of which the railway company's indebtedness to him had arisen, and he wished the money kept in a separate account.

The garnishee summons came on for hearing before the Local Judge apparently on the 22nd February, 1917; but was not finally disposed of until the 2nd April, 1917; and then the order disposing of it merely directed payment, by the respondents to the appellants, of \$13.60, besides making some provision as to the costs of the garnishee proceedings.

A minute endorsed on the garnishee summons, made by the Local Judge, dated the 22nd February, 1917, indicates that the learned Judge then found that the railway company was not indebted to the judgment debtor at the time of the service of the attaching order, but that the respondents were indebted to him in the sum of \$13.60, to which sum they were entitled in the garnishee proceedings. On the 20th March, 1917, the railway company paid to the respondents, under the assignment before-mentioned, a little more than \$3,600, the balance, payable by them, of their indebtedness to the judgment debtor so assigned to the respondents; the appellants appealed against the order of the Local Judge, dated the 2nd April, 1917, and that appeal was heard, and, after procuring further evidence, was considered by Masten, J., who increased the amount payable by the respondents under the order made by the Local Judge by adding to it the sum of \$144.60, but in other respects dismissed the appeal; the amounts thus found due were balances appearing to the credit of the judgment debtor in these separate accounts, kept by the respondents, in their book, with him: none of them was affected by the money received by the respondents from the railway company under the assignment before-mentioned, except to the extent of the payment, on the 9th December, 1916, of a little more than \$1,000. So that the learned Judge must have considered that the balance of such assigned moneys, received by the respondents on the 20th March, 1917, were not subject to the garnishee proceedings:

but, if not, then there was really no money attachable, for, though these balances appeared in the respondents' books on the day that the garnishee order was served, yet the judgment debtor was then really in debt to the respondents in a large amount upon notes etc., not matured, and which would be charged against the judgment debtor in these accounts only at maturity. So that the order is wrong in any case.

The simple question upon these facts is: whether the balance of the money due by the railway company to the judgment debtor, which was paid to the respondents under the assignment before-mentioned on the 20th March, 1917—that balance, after payment out of it of all the judgment debtor's indebtedness to the respondents, and after payment out of it also of all lawful charges upon it, having priority to the garnishee order, if any—was money attachable in garnishee proceedings, or which can in any way be reached in such proceedings, or upon this appeal.

As no question of fraud is raised, nor even of insolvency, I cannot think that the money was attachable in the hands of the railway company, for under the assignment they were bound to pay it over to the respondents; the right of action to recover it was theirs, not their assignor's. And, that being so, it follows that, unless it was attachable, or can be otherwise reached, in the hands of the respondents, it was not attachable, and cannot be reached, at all; and, if that be so, all that a judgment debtor need do to defeat garnishee proceedings is to assign to a third person the money coming to him; then the debtor is free, and the assignee is not liable until he receives the money, nor after he pays it over; and, if that be so, it is difficult to see how garnishee proceedings can be made effectual. But, if it really be so, it is very strange that no one has before discovered, and put into effect, this simple method of defeating public policy and the enactment. It would be exceedingly regrettable if we were obliged to give it any countenance: and for two reasons, which seem to me to be very plain, I am quite sure we are not obliged to do so.

At all times after the assignment was taken by the respondents, they were under a legal obligation to get in the money and pay, to the judgment debtor, the balance of it. When the garnishee orders were served, the money was payable to them, and they had already received a little more than \$1,000 of it; there was no

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.
v.
HARTY.

Meredith,
C.J.C.P.

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.

v.
HARTY.

Meredith,
C.J.C.P.

uncertainty regarding it or indeed the amount of it: it was money coming to the judgment debtor, and none the less accruing to him because it had to pass through the respondents' hands before he should receive it. I can perceive no good reason why money thus coming to a judgment debtor, and money which the garnishee is under a legal obligation to him to get in, and put into a special account subject to his order, and to pay over to him, may not be attached in garnishee proceedings, though of course no order for payment over can be made until the money has come to the hands of the garnishee: and the cases seem to me to quite warrant that conclusion. In that of *O'Driscoll v. Manchester Insurance Committee*, I cannot find that the judgment of the Court of Appeal was based upon any finding of fact that the moneys were already in the hands of the garnishees when the attaching order was served: Swinfen Eady, L.J., puts it thus (p. 511): "The Insurance Committee received from time to time payments of large sums on account from the Insurance Commissioners, and when they received all the funds for the year they would be in a position to determine the amount payable to each doctor."

The rule in the Courts of the United States of America is thus stated in the American and English Encyclopædia of Law, 2nd ed., vol. 14, p. 769: "In order to render the claim not liable to garnishment it is necessary, however, that the contingency should affect the actual liability of the garnishee and be such as may prevent the defendant from having any claim whatever against the garnishee or right to call him to an accounting."

And need I add that this case is not one in which the garnishees were under no obligation to the judgment debtor; that, by reason of the assignment, they were not in the position of one who becomes answerable on the money count for money received for the use of another only when the money has been so received? The respondents were at all times liable to account to the judgment debtor and to pay over the surplus of the moneys received as soon as it was ascertained on such an accounting: and, before the order in question was made—on the 2nd April, 1917—the respondents had received all the moneys due and payable to them under the assignment; and there was apparently a surplus of such moneys in their hands after payment of all their claims

against the judgment debtor, their customer, of over \$1,300, according to the testimony of their manager at Fort Frances. If this money of the judgment debtor, so in the hands of these garnishees—subject to any prior charges upon it, if any—cannot be reached by the judgment creditors in these proceedings, garnishee proceedings, instead of being made effectual by the rulings of the Courts, will be reduced to something like a farce.

Then these moneys, over and above the amount needed to satisfy the respondents' just claims against the judgment debtor, were in truth the moneys of the judgment debtor, the respondents received and held them, in a special account, solely for him and subject to his order; it was his money, and, whether in the shape of "bank-notes," "cheques," or "moneys," was subject to the appellants' writ of execution, which was, to the knowledge of the respondents, in the hands of the sheriff in full force and virtue, binding such things, as well as all other the goods and lands of the judgment debtor in the sheriff's bailiwick: see secs. 10 and 20 of the Execution Act, R.S.O. 1914, ch. 80. And not only had the respondents knowledge of these things, but they knew that these moneys had been attached in the hands of the railway company and in their own hands, and that the garnishee proceedings were in force and might be eventually decided against them when they parted with the moneys, if they have really done so.

In these circumstances, if it be the law that the appellants can have no relief in this Court in these proceedings, if it be the law that a judgment debtor can defeat garnishee proceedings by merely appointing an agent to receive for him the moneys coming to him, and by making an assignment of them to such agent, some one else must say so. I can say only that, if that be the law, there is some good reason for some of the harshest things that have been said against it.

One of my learned brothers seems to find the greater difficulty in the manner in which the appellants' rights should be worked out; but I cannot think it should make any great difference by which door of this Court of Justice the parties have entered, so long as all concerned are in Court and their cases can be fully heard and considered. I decline to aid in turning them out merely so that they may come in some other way.

App. Div.
1917

RAT
PORTAGE
LUMBER
Co.

v.
HARTY.

Meredith,
C.J.C.P.

App. Div.

1917

RAT
PORTAGE
LUMBER
Co.

v.

HARTY.

Meredith,
C.J.C.P.

I would allow the appeal, and make the order which I have mentioned, and would give to the appellants the costs of this appeal; no costs of the proceedings heretofore in the High Court Division. Costs of the reference to abide the event.

Appeal dismissed; MEREDITH, C.J.C.P., dissenting.

[APPELLATE DIVISION.]

1917

April 20.
Sept. 28.

HENRY HOPE & SONS LIMITED v. CANADA FOUNDRY CO.

Contract—Supply of Building Material—No Time Fixed for Performance—Reasonable Time Allowed—Delay from Unavoidable Cause—Strike of Workmen—No Delay Amounting to Breach—Refusal to Accept Material—Damages—Third Party Proceedings—Rule 165—Claim Made by Defendants against Third Parties—Objection to Regularity not Made at Trial—Claim Determined in Action against Defendants—Material Ordered from Plaintiffs to be Supplied by Defendants to Third Parties—Failure to Supply within Reasonable Time—Dismissal of Claim—Appeal.

The L. company, desiring certain building material, made a contract (7th July, 1914) with the defendants, an Ontario company, for a supply of the material. The defendants made a contract (19th September, 1914) for the supply to them of the material by the plaintiffs in England. On account of delay in supplying the material, the L. company notified the defendants that their contract was cancelled, whereupon the defendants notified the plaintiffs that their contract was cancelled, but neither the defendants nor the plaintiffs accepted the cancellation. The plaintiffs sued the defendants for damages for refusal to accept the material; and the defendants brought in the L. company as third parties, and claimed indemnity or relief over against them:—

Held, that, no time being either expressly or by reference to known circumstances fixed for the performance of the plaintiffs' contract, they were entitled to a reasonable time, and had not exhausted that reasonable time when a strike took place, which caused delay; that the time during which the strike lasted was not to be counted against the plaintiffs, it being attributable to causes beyond their control; that after the strike there was no delay except such as was caused by it; that no delay of the plaintiffs in the performance of their contract was a breach of it; and that they were entitled to recover damages.

Hick v. Raymond & Reid, [1893] A.C. 22, and *Sims & Co. v. Midland R.W. Co.*, [1913] 1 K.B. 103, followed.

Held, in respect of the defendants' claim against the third parties, that the defendants failed to supply the material within a reasonable time, and so were guilty of a breach of their contract, and consequently could not enforce it or recover damages for a breach of it.

Judgment of LATCHFORD, J., affirmed.

Per HODGINS, J.A., and RIDDELL, J.:—The case was not a proper one for third party proceedings—the loss of the defendants was due to their own act, and not to any act of the third parties. There was no ground for seeking indemnity or relief over: Rule 165.

Per MEREDITH, C.J.C.P., and LENNOX, J.:—Whether the third party proceedings were regular or irregular, no objection to them had been made by any party, the claim against the third parties had been adjudicated upon at the trial, and there was no reason for refusing to consider it on an appeal from the judgment at the trial.

ACTION for damages for the defendants' refusal to accept "steel sash" manufactured by the plaintiffs for the defendants; and claim over by the defendants against the R. Lyall & Sons Construction Company Limited, third parties.

The action and the claim against the third parties were tried by LATCHFORD, J., without a jury at Toronto.

George Wilkie, for the plaintiffs.

J. A. Paterson, K.C., for the defendants.

M. K. Cowan, K.C., and *A. G. Ross*, for the third parties.

April 20. LATCHFORD, J.:—A reconsideration of the evidence and a careful perusal of the correspondence filed have confirmed me in the opinion which I formed at the close of the trial, that the plaintiffs are entitled to succeed, and that the defendants have no claim against the third parties.

For the delays which occurred between the submission of the plaintiffs' tender of the 4th April, 1913, and its formal acceptance by the defendants on the 19th September, the plaintiffs are not to blame. They even anticipated the order by communicating on the 2nd September with their head-office at Birmingham, England, where, to the knowledge of the defendants, the steel ceiling lights were to be manufactured. No time-limit was fixed by the contract between the plaintiffs and the defendants, and I accept without question the testimony of the plaintiffs' manager in Canada, that he would not have undertaken the work with an obligation to complete it within a definite time. The lights required sash composed in part of members which had to be milled from standard bars or specially rolled. Other components also had to be specially manufactured. Bars of standard section might indeed have been used, but they would not have conformed to the designs submitted and approved, nor to the exceptionally high quality of the steel sash ordinarily made by the plaintiffs.

Some little delay was not improbably occasioned in England owing to the fact that an inquiry as to whether the saddle-bars were shewn in the approved drawing as looked at from above or from below, was answered by letter instead of by cable; but any such delay I regard as trivial, and as incidental to the work. In any event, it would not have resulted in the completion of the work

1917

HENRY
HOPE
& SONS
LIMITED

v.

CANADA
FOUNDRY
Co.

Latchford, J.

1917

HENRY
HOPE
& SONS
LIMITED

v.

CANADA
FOUNDRY
Co.

by the 22nd November, when the plaintiffs' employees began a strike, which lasted until long after the contract between the defendants and the third parties had been cancelled, on the 28th December, and the defendants had thereupon notified the plaintiffs that the contract between them and the plaintiffs was also cancelled.

Had the defendants acted with reasonable promptness after receiving the order from the third parties and the tender of the plaintiffs, the work, as stated by Mr. Young, would have been completed long before the strike began.

It is not, in my opinion, open to the defendants to say that the third parties should not have cancelled their contract with the defendants. Responsibility for the inaction in the early summer of 1913 rests upon the defendants, and upon them alone, and they cannot shift the burden to the Lyall company.

It was agreed at the trial that damages, if recoverable, should be fixed at £225 plus 10 per cent., equal, at exchange \$4.86, to \$1,202.85.

There will be judgment for the plaintiffs for that amount with costs, and dismissing with costs the claim of the defendants against the third parties.

The defendants appealed from the judgment of LATCHFORD, J.

June 8. The appeal was heard by MEREDITH, C.J.C.P., HODGINS, J.A., RIDDELL and LENNOX, JJ.

J. A. Paterson, K.C., for the appellants.

George Wilkie, for the plaintiffs, respondents.

M. K. Cowan, K.C., for the third parties, respondents.

September 28. MEREDITH, C.J.C.P.:—This case has been dealt with, by counsel for all parties, in the action and in the claim of the defendants against the third parties, each, as if it were one: (1) in which the plaintiffs were entitled to a reasonable time for the performance of their contract; (2) in which all the questions raised in the third party proceedings, as well as in the action, might be considered; and (3) in which the time lost by the plaintiffs through a "strike" of their workmen should not be counted against them, though at the

conclusion of his reply Mr. Paterson seemed desirous of changing the attitude which up to that time he had maintained on that subject.

In all these respects I am in accord with them, though, having regard to the very general manner in which the first point was put by them, I desire to say that there may well be a time fixed for the performance of a contract though no time be expressed; that, indeed, in cases of contracts for supplying goods which are known to be needed for a certain purpose, at a certain time, the contract is, under ordinary circumstances, to be performed so that such need may be met. But that was not this case; in this case the time for the construction of the building for which the metal sashes in question were needed had passed before the contract in question was made, and by no other means had a specified limitation in time been imposed upon any of the parties to contract or sub-contracts. And, as to the second point, to say that: whether these third party proceedings were regular or irregular, no objection to them having been taken by any party, but, on the contrary, all parties throughout having desired, and still desiring, that the questions raised in those proceedings should be determined in this action, and as they were so determined at the trial of the action, there is no good reason for refusing to consider them here, upon this appeal, and really would be no good excuse for turning the parties out of Court in this respect merely to come into Court again with the same questions for our consideration after much useless expense and delay.

That being so, the first question for our consideration is: whether any delay of the plaintiffs in this action in the performance of their contract was a breach of it.

It is quite clear from the evidence, that, but for the strike of the plaintiffs' workmen, their contract would have been performed within a time quite satisfactory to all persons concerned in its performance; there could have been no reasonable contention that they had exceeded a reasonable time. The sashes were very nearly completed when the strike took place, and, but for the delay so caused, could and should have come to the contractors in time to have prevented any need for delay on their part in putting them in place and proceeding with the completion of their contract.

The plaintiffs in the action were under no obligation to any one

App. Div.
1917

HENRY
HOPE
& SONS
LIMITED
v.
CANADA
FOUNDRY
Co.

Meredith,
C.J.C.P.

App. Div.
1917

HENRY
HOPE
& SONS
LIMITED
v.

CANADA
FOUNDRY
Co.

Meredith,
C.J.C.P.

to proceed with the work they were to do until the formal contract in writing, which they required, had been made; and, having regard to delays commonly occurring in the prosecution of such work as that which the plaintiffs were to do—in this case the delay caused by making sure as to the meaning of the plans, furnished by the contractor, of these sashes for instance—I cannot find that the plaintiffs had exhausted their reasonable time, for the performance of their contract, at the time when the strike took place.

And the cases, I think, require us to hold that the time during which the strike lasted is not to be counted against the plaintiffs. The law is said to be “that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably,” in cases in which the law allows him a reasonable time: see *Hick v. Raymond & Reid*, [1893] A.C. 22, 32, 33; and *Sims & Co. v. Midland R.W. Co.*, [1913] 1 K.B. 103. The evidence in this case brings the plaintiffs within the law as so expressed, as well as expressed by all the Judges who considered those cases: and no one suggests that after the strike there was any delay except such as was caused by it, or that the strike was not attributable to causes beyond the plaintiffs’ control. I am therefore unable to find any fault in the judgment of the trial Judge upon this branch of the case.

On the other branch of it, the finding of the trial Judge was that the plaintiffs in the third party proceedings had not within a reasonable time performed their contract, and so could not enforce it.

No time was fixed for the performance of this contract, and the considerations respecting a reasonable time apply to it the same as to the other contract; but this contract was made on the 7th July, 1914, whilst the other was not made until the 19th September, 1914, and each was for the same sashes; that difference in time is the main difference between them; if made at the same time, there is no reason why the same result should not be reached as to each, and none the less so, rather the more, because the contract of the plaintiffs in the third party proceedings contains a clause, favourable to them, respecting “strikes.”

But from the 7th July until the 19th September the plaintiffs did nothing effectual towards the performance of their contract; if they had at once, or indeed at any time up to the beginning of

this September, made their contract with the plaintiffs in the action, there can be no doubt, upon the evidence, that the contract would have been fulfilled before the strike took place. I gather from some parts of the evidence, and from some things said by counsel, that the delay from July to September was caused by the plaintiffs in the third party proceedings having some hope of being able to make the sash themselves in their factory, and that it was only when that hope failed that the contract with the plaintiffs in the action was made.

But, however that may be, I am unable to say that, under all the circumstances of the case, the trial Judge erred in his finding: that the plaintiffs in the third party proceedings failed to supply the sash within a reasonable time, and so were guilty of a breach of their contract, and consequently cannot enforce it or recover damages for a breach of it against the defendants in those proceedings.

Nothing turns upon the notices given, erroneously called notices of cancellation of the contracts: in each case the contractors were entitled to a reasonable time for the fulfilment of the contract; no one could shorten the time or cancel the contract against the will of the other parties to it: the notices might be treated as breaches of the contract—if the reasonable time had not elapsed—and suit for damages for breach of it might be brought, as the plaintiffs in this action have done.

I am in favour of dismissing each appeal.

LENNOX, J., agreed with the Chief Justice.

RIDDELL, J.:—The third parties had a contract for the erection of a hotel at Calgary, and, desiring certain material, made a contract with the defendants (of Toronto) for the same. The defendants made a contract for the supply to them of the material by the plaintiffs in England. By reason of the delay in supplying this material, the third parties cancelled the contract with the defendants, whereupon the defendants gave notification to the plaintiffs of cancellation of their contract—neither the defendants nor the plaintiffs accepted the cancellation.

The plaintiffs sued the defendants for damages, whereupon the defendants brought in the third parties by the practice pro-

App. Div.
1917

HENRY
HOPE
& SONS
LIMITED
v.

CANADA
FOUNDRY
Co.

Meredith,
C.J.C.P.

App. Div.
1917

HENRY
HOPE
& SONS
LIMITED
v.
CANADA
FOUNDRY
CO.

Riddell, J.

vided by the Rules. The case came on for trial before my brother Latchford, and that learned Judge found in favour of the plaintiffs against the defendants, but in favour of the third parties.

This is an appeal by the defendants against both branches of the judgment.

I can find no reason to disagree with the conclusion of my learned brother in respect of the claim of the plaintiffs and have nothing to add to what he has said in that regard—but the claim to be indemnified by the third parties has given me more trouble.

I have come to the conclusion that this is not a case in which the Rule* applies at all, and that there is no power to grant any relief to the defendants against the third parties at all in this action (unless by consent).

When the third parties cancelled their contract, the cause of action in the defendants against them was complete, and they might have brought their action at once. The damages they could claim (assuming the contract to have been broken and the cancellation wrongful) would be the difference between what the third party promised to pay and the cost to the defendants. This action could not depend upon anything the defendants should do in reference to their contract with the plaintiffs—they might insist upon that contract or attempt to abandon it, and their cause of action against the third parties could not be in the least affected.

Nothing done by the third parties was the cause of the damages sought in this action by the plaintiffs against the defendants. It is true that it may have been the part of wisdom for the defendants to try to put an end to their contract with the plaintiffs: but there was nothing whatever to prevent them standing by that contract, receiving the goods and tendering them to the third parties.

The loss of the defendants was due to their own act, and not to any act by the third parties—there is no case of indemnity and of course none of contribution. Nor can it be said to be a case of “relief over.” What the defendants must pay is the difference

* Rule 165.—(1) Where a defendant claims to be entitled to contribution or indemnity from or any other relief over against any person not a party to the action, hereinafter called a third party, he may issue a notice. . . .

between the amount they agreed to pay to the plaintiffs and the cost to the plaintiffs of supplying the goods—what they must claim from the third parties has nothing to do with this, is calculated on different facts and a different principle: *Campbell v. Farley* (1898), 18 P.R. 97; *Wynne v. Tempest*, [1897] 1 Ch. 110.

The test applied by Chitty, J., in the last-named case, is not unfair: "If the plaintiff failed in the action, would the defendant's claim against the third parties be thereby defeated? It is clear that it would not." So in the present case, the plaintiffs might have failed against the defendants, without affecting the defendants' claim against the third parties.

The regular course then would be to dismiss the appeal of the defendants against the third parties, but it should be done with a reservation of their right to assert their claim against the third parties and without prejudice to such a claim.

But all parties desire their rights to be disposed of in this action: and accordingly I say that the learned trial Judge was right in his judgment on this point also.

Both appeals should be dismissed with costs.

HODGINS, J.A., agreed with RIDDELL, J.

Appeal dismissed with costs.

[ROSE, J.]

RE METROPOLITAN THEATRES LIMITED.

MAGEE REAL ESTATE CO. LIMITED'S CLAIM.

Landlord and Tenant—Assignment by Tenant for Benefit of Creditors—Landlord's Preferential Lien for Rent—Landlord and Tenant Act, sec. 38—Period Covered by Lien—Rent in Arrear—"Execution of the Assignment"—"Execution" Including Delivery—Fraction of Day.

In sec. 38 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, providing that in case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent during the period of one year next preceding and for three months following the "execution of the assignment," the words quoted are used in their strict legal sense, and mean the completion of the deed of assignment by delivery as well as by signing and sealing.

Where a deed of assignment was signed and sealed by the assignor on the day on which a month's rent in advance was due, but was not completed nor intended to be completed by delivery to the assignee until the following day, and was not actually completed until the day next after that, it was held (the month's rent not having been paid), that rent was in arrear at

App. Div.
1917

HENRY
HOPE
& SONS
LIMITED
v.
CANADA
FOUNDRY
Co.

Riddell, J.

1917

Sept. 29.

1917

RE
METRO-
POLITAN
THEATRES
LIMITED. ✓

MAGEE
REAL
ESTATE
Co.
LIMITED'S
CLAIM.

the first moment of time of the day after the gale-day; and, there never having been any intention that the deed should be handed to the assignee until after the commencement of business on that day, there were arrears when the deed was "executed," and the landlord was entitled to a preferential lien for four months' rent; the rule as to disregarding fractions of a day having no application in such a case.

AN appeal by the Magee Real Estate Company Limited from an order of the Master in Ordinary, in the matter of the winding-up of the Metropolitan Theatres Limited, an incorporated company, disallowing part of the claim of the appellant company as landlord of the insolvent company.

The appeal was heard in the Weekly Court at Toronto.

H. S. White, for the appellant company.

A. C. McMaster, for the liquidator of the insolvent company.

September 29. ROSE, J.:—The insolvent company was tenant to the claimant, the Magee Real Estate Company Limited. The rent reserved by the lease was \$20,000 *per annum*, payable in even monthly instalments of \$1,666.67, in advance, on the 21st day of each month during the term. The lease contained a provision that if the lessee should make an assignment for the benefit of its creditors or should go into voluntary or involuntary liquidation, the then current month's rent, together with the rent for the eleven months next succeeding, should immediately become due and payable.

On the 21st February, 1917, the insolvent company signed and sealed an assignment for the benefit of its creditors, and left the document with its solicitor—the intention being that some small debts should first be paid, and that the solicitor should then make the assignment effective by giving the document to the assignee on the 22nd. Owing to some delay or misunderstanding of instructions on the part of a clerk of the solicitor, the assignment did not come to the hands of the assignee until the 23rd. The assignee promptly went into possession. At that time there were distrainable assets sufficient to pay the rent.

The winding-up order was made on the 2nd March, 1917.

The month's rent due in advance on the day of the date of the assignment, the 21st February, was not paid. The landlord claims a preference for that rent and for the rent for the three months following. The Master in Ordinary, dealing with the

matter as Referee in the winding-up, has held that, in the circumstances of the case, the preference extends only to the rent for three months, including the rent due on the 21st February. The landlord now appeals.

Upon the argument before me, both counsel presented the case as one falling to be determined solely upon the interpretation to be given to the expression "execution of the assignment" in sec. 38 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, which reads as follows: "In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent during the period of one year next preceding and for three months following the *execution of the assignment*"

For the landlord it was contended that the assignment was not *executed* until it was delivered to the assignee on the 23rd February; for the liquidator it was argued that the execution was on the 22nd, the day on which the company's solicitor was expected to hand it to the assignee; and that, as there was no default in payment of rent until after the 21st, there were no arrears during the period preceding the execution of the assignment; and, alternatively, it was suggested on behalf of the liquidator that the assignment was *executed* on the 21st, when it was signed and sealed.

To my mind it is clear that the assignment was not *executed* on the 21st. In order that a deed shall be effective it must be "delivered," that is to say, the party whose deed the document is expressed to be, having first sealed it, must by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the expressions contained therein: Halsbury's Laws of England, vol. 10, p. 386, art. 691. While he need not part with the possession of the document, he must intend to be bound by it: *Barlow v. Heneage* (1702), Prec. in Ch. 210; *Evans v. Grey* (1882), 9 L.R. Ir. 539; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671.

Now, sometimes one speaks of the "execution" of a document, in the sense of the signing or signing and sealing of it. As an illustration see the judgment of Sullivan, M.R., in *Evans v. Grey*, *supra*, where he speaks of the deed in question in that case as having been *executed*, and as declaring a perfect trust "if it was

Rose, J.

1917

RE
METRO-
POLITAN
THEATRES
LIMITED.

MAGEE
REAL
ESTATE
CO.
LIMITED'S
CLAIM.

Rose, J.

1917

RE

METRO-
POLITAN
THEATRES
LIMITED.MAGEE
REAL
ESTATE
Co.
LIMITED'S
CLAIM.

delivered." But, notwithstanding the fact that the word is sometimes so used, it seems to be correct to say, as is said in 17 Cyc. 875-877, that when it is used in its proper sense it conveys the meaning of carrying out some act to its completion: that, as applied to a written instrument, it includes the performance of all acts which may be necessary to render it complete—the signing, sealing, and delivery. A recent case in which the statement from Cyc. is adopted, is *United States Mortgage and Trust Co. v. Central San Cristobal Inc.* (1915), 7 Porto Rico Fed. Reps. 693. See also the cases collected in *Words and Phrases Judicially Defined*, vol. 3, p. 2558, and in *Bouvier's Law Dictionary*, 3rd revision, p. 1112; *Barron and O'Brien's Chattel Mortgages*, 2nd ed., pp. 414, 416, where the meaning of the words as used in the *Bills of Sale and Chattel Mortgage Act*, R.S.O. 1914, ch. 135, sec. 18, is discussed; *Elliott v. Merchants Bank and Trust Co.* (1913), 21 Cal. App. 536, where the two senses in which the word may be used are mentioned, and it is pointed out that the sense in which it is used in any particular instance can generally be seen from the context.

I do not find anything in the statute to indicate that the word as used in sec. 38 of the *Landlord and Tenant Act* is used in any other than what seems to me to be its strict legal sense, viz., completion. Upon the admitted facts, there is no evidence of any intention that the assignment should be complete on the 21st.

I am not so clear about the 22nd; but I do not find in the written admissions presented to the Master in Ordinary, or in the supplementary statements made by counsel upon the appeal, any evidence that the company intended to be bound by the document while it remained under the control of the company's solicitor: therefore, if it was necessary to determine whether the execution was on the 22nd or on the 23rd, I should hold that it was on the 23rd. However, I do not think that it is necessary to go that far. The rent that fell due on the 21st was in arrear at the first moment of time on the 22nd, and there was never any intention that the assignment should be handed to the assignee until after the commencement of business on that day; so that there was rent in arrear before the hour at which the company intended to become bound by the assignment. In such cases the rule

as to disregarding fractions of a day, invoked by Mr. McMaster, has no application: Halsbury, vol. 27, pp. 454, 455, art. 899; therefore, even if the intention to deliver is treated as equivalent to actual delivery, there were arrears when the assignment was executed.

The landlord is entitled to the preference claimed, and should have the costs of the appeal. There is nothing before me to shew how the costs of the proceedings before the Master in Ordinary were disposed of. Presumably the landlord ought to have them also; but, if there is any question on that score, the matter may be further discussed.

Rose, J.

1917

RE
METRO-
POLITAN
THEATRES
LIMITED.

MAGEE
REAL
ESTATE
CO.
LIMITED'S
CLAIM.

[IN CHAMBERS.]

1917

Oct. 2.

REX v. TUGMAN.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Liquor in Motor-car—Depositions not Read over to and Signed by Witnesses—Sec. 74—Absence of Prejudice—Defence—Carrying Liquor from one Lawful Place to another—Sec. 43—Evidence—Onus—Sec. 88—Proof of Offence—Finding of Magistrate.

Upon a motion to quash a conviction of the defendant, by a magistrate, for unlawfully having intoxicating liquor in her possession, elsewhere than in her private dwelling-house—she had a bottle of gin in her motor-car—contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50:—

Held, that failure on the part of the magistrate to comply with sec. 74 of the Act, by causing the depositions of the witnesses to be read over to and signed by them, did not invalidate the conviction, at all events unless it was shewn that the defendant was in some way prejudiced thereby.

Rex v. Leach (1908), 17 O.L.R. 643, *Rex v. McDevitt* (1917), 39 O.L.R. 138, and *Montreal Street R. W. Co. v. Normandin*, [1917] A.C. 170, followed.

(2) It was objected that no offence was proved. But the defendant had in her possession the liquor in respect of which she was prosecuted, and it was for her to prove that she did not commit the offence with which she was charged: sec. 88. The defence was that the defendant was carrying the liquor from one place where she might lawfully have it to another such place, and that no use had been made of it *en route*: sec. 43 (amended by 7 Geo. V. ch. 50, sec. 14). If the magistrate did not believe the defendant's statement (which was not shewn), that was the end of the case (*Rex v. Le Clair* (1917), 39 O.L.R. 436); it could not be assumed that he did believe the statement but proceeded upon a view of the effect of sec. 43 different from that put forward by the defendant.

The motion was dismissed.

MOTION to quash a conviction of the defendant, Mary Tugman, by the Police Magistrate for the Town of Oakville, for unlawfully having intoxicating liquor in her possession, elsewhere

1917

REX

v.

TUGMAN.

than in her private dwelling-house, contrary to sec. 41* of the Ontario Temperance Act, 6 Geo. V. ch. 50.

August 23. The motion was heard by ROSE, J., in Chambers.
D. O. Cameron, for the defendant.

Edward Bayly, K.C., for the Police Magistrate.

October 2. ROSE, J.:—The defendant had in her possession, in a motor-car, a bottle containing gin. The defence was that she was carrying it from one place where she might lawfully have it to another such place, and that no use had been made of it *en route*: sec. 43. The defendant also adduced evidence that her physician had advised her always to have some alcoholic stimulant on hand, but she did not give evidence that the physician had given a written prescription addressed to a druggist or that the gin had been supplied by a druggist: sec. 51.

Two objections are urged: the one that the depositions were not read over to or signed by the witnesses: sec. 74; the other, that no offence was proved.

(1) The deposition of the only witness called by the prosecution was signed by him at some time, as appears by the papers produced. The other depositions are unsigned. Objection was taken to the receipt of affidavit evidence that none of the depositions were read over at the time of the hearing before the magistrate, and that the one that was signed was not signed then. It is unnecessary for me to pass upon the question as to the admissibility of this affidavit; for, even assuming all the facts stated in it to be regularly established, the case of *Rex v. Leach* (1908), 17 O.L.R. 643, is a binding authority that failure on the part of the magistrate to comply with sec. 74 does not invalidate the conviction—at all events unless it is shewn that the defendant was in some way prejudiced thereby: *Rex v. McDevitt* (1917), 39 O.L.R. 138; *Montreal Street R.W. Co. v. Normandin*, [1917] A.C. 170. The first objection fails.

*41.—(1) Except as provided by this Act, no person by himself, his clerk, servant or agent shall have or keep or give liquor in any place where soever, other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license.

(2) The defendant had in her possession the liquor in respect of which she was prosecuted, and it was for her to prove that she did not commit the offence with which she was charged: sec. 88. There is nothing in the record to shew whether the magistrate refused to credit her explanation, or, giving credit to it, was of opinion that she had not brought herself within sec. 43, as amended by 7 Geo. V. ch. 50, sec. 14*. If the magistrate did not believe the defendant's statement, that is the end of the case: *Rex v. Le Clair* (1917), 39 O.L.R. 436; and it is not for me to assume that he did believe the statement but proceeded upon a view of the effect of sec. 43 different from the view put forward on behalf of the defendant. Therefore, the question as to the true construction of sec. 43 does not arise, and the objection fails.

The motion will be dismissed with costs.

*Section 43, as amended, reads: "Nothing in section 40 hereof contained shall apply to sales under execution or other judicial process or for distress, or to sales by assignees or trustees in bankruptcy or insolvency, provided that the stock of liquor is not broken for the purpose of such sale, and nothing in section 41 contained, shall prevent common carriers or other persons from carrying or conveying liquor from a place outside of Ontario to a place where the same may be lawfully received and lawfully kept in Ontario, or from a place where such liquor is lawfully kept and lawfully delivered within Ontario to a place outside Ontario, or from a place where such liquor may be lawfully kept and lawfully delivered in Ontario to another place in Ontario where the same may be lawfully kept, or through Ontario from a place outside of it to another place outside of it, but no person during the time such liquor is being carried or conveyed as aforesaid shall open or break or allow to be opened or broken any package or vessel containing the same, or drink or use or allow to be drunk or used any liquor therefrom."

Rose. J.
1917
REX
v.
TUGMAN.

1917

Oct. 3.

[IN CHAMBERS.]

REX v. DAVIS.

Criminal Law—Contributing to Making Child a “Neglected Child”—Children’s Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 18 (d)—Conviction of Mother’s Paramour—Jurisdiction of Commissioner of Juvenile Court—Evidence—Offence not Disclosed—Absence of Actual Injury to Child—Powers of Provincial Legislature—Statutory Crime—Creation of Tribunal.

Under sec. 18 (d) of the Children’s Protection Act of Ontario, which enacts that any person who is guilty of an act or omission which contributes to a child being or becoming a neglected child, shall incur a penalty and be liable to imprisonment, there is no right to punish unless it is shewn that there was an actual injury to the child; when the child is of such tender years as to be unable to appreciate the moral quality of its mother’s conduct, her adultery does not *ipso facto* make the child a neglected child within the meaning of the Act; and the adulterer cannot be convicted of contributing to making the child a neglected child.

Rex v. Owens (1915), an unreported decision of CLUTE, J., followed.

Conviction by the Commissioner of the Juvenile Court for the City of Toronto, under sec. 18 (d), quashed on the ground that the evidence did not disclose an offence against the statute.

Semble, that in this enactment the Ontario Legislature has exceeded its powers, has made a statutory crime, and has made it punishable before a tribunal of its own creation, although the Provincial authorities have not the power to appoint Judges.

MOTION to quash a conviction of the defendant, by the Commissioner of the Juvenile Court for the City of Toronto, for contributing to the infant child (two years old) of Katherine Vera Reynolds being or becoming a neglected child.

The conviction was under the Children’s Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 18 (d): “Any person who . . . is guilty of an act or omission which contributes to a child being or becoming a neglected child, shall incur a penalty not exceeding \$100 and in lieu of or in addition thereto shall be liable to imprisonment for a term not exceeding one year.”

September 22. The motion was heard by MIDDLETON, J., in Chambers.

T. N. Phelan, for the defendant.

J. E. Jones, for the informant and the Commissioner.

October 3. MIDDLETON, J.:—Motion to quash a conviction made by the Commissioner of the Juvenile Court, Toronto, on the 31st July, 1917, whereby the accused was convicted “for that . . . he did contribute to Kathleen Reynolds, a child under the age of 16 years, being neglected, in that Katherine

Vera Reynolds, being the mother of the child, by her neglect, cruelty, or depravity, has caused the home of the said child to be an unfit place for her, and he, the said Vincent Davis, by his improper conduct in the home of the said child, in connection with its said mother, has caused the said home to be an unfit place for the said child."

The evidence is simple and uncontradicted. Katherine Vera Reynolds and her husband have been married about 8 years. They have one child, a little girl under three years of age. The husband was serving with the forces overseas, leaving Canada on the 17th May, 1916. From the beginning of June, 1916, the accused has had improper relations with the wife, being a frequent visitor at the house. As the result she is now pregnant. The husband recently returned on leave, and the wife and her adulterer were prosecuted before the Commissioner. The wife admitted the charge, and was allowed to go on suspended sentence, her husband agreeing to receive her again; and, upon the wife's evidence, Davis was convicted and sentenced to 9 months in gaol.

There was no evidence that, apart from the statutory definition of a neglected child, this child was in any way neglected. There was no suggestion that it was not well fed, well clothed, and cared for. 'The only thing was that the mother and the accused were guilty of immoral conduct. At the time the offences were committed, the child was asleep, but the accused was frequently in the house while the child was awake, and it learned to call him, as its mother did, by his Christain name.

What is said is, that the accused is being punished, not because of any harm being actually done to the child, but because he has been guilty of adultery with the child's mother, and that the Commissioner takes the view that under the statute he has the right and duty to punish immorality.

The question is manifestly one of great and far-reaching importance. There are very few who do not regret the absence from the Criminal Code of any provision for the punishment of adultery, and none can have any sympathy for the accused, whose abominable conduct merits far more drastic punishment than that awarded by the Commissioner, but abhorrence of misconduct cannot justify imprisonment unless there is some statutory foundation for the award of punishment.

Middleton, J.

1917

REX

v.

DAVIS.

Middleton, J.

1917

REX

v.

DAVIS.

In an unreported decision of Mr. Justice Clute in *Rex v. Owens* (1915), my learned brother determined the precise question now before me in favour of the contention of the accused, and held that there was not, under the statute, any right to punish unless it was shewn that there was an actual injury to the child, and, when the child was of such tender years as to be unable to appreciate the moral quality of its mother's conduct, her immorality did not *ipso facto* make the child a neglected child within the meaning of the Act; and, consequently, the adulterer could not be convicted of contributing to making the child a neglected child.

Under the statute (the Judicature Act, sec. 32 (2)), I am bound to follow this, and am not at liberty to think for myself, so I blindly yield obedience and quash the conviction upon the ground that the evidence does not disclose an offence against the statute.

I should have preferred to reach the same result by another route. The Province, having no right to deal with criminal law, but only the right to impose such sanctions as are necessary for the due enforcement of its legislation upon such matters as come within its jurisdiction, has probably exceeded its powers and has made a statutory crime and has made this punishable before a tribunal of its own creation, although it has not the power to appoint Judges. These two matters, however, can only be dealt with after due notice has been given to the Provincial and Dominion authorities.

If this matter is brought before an appellate Court, as I trust it may be, notice should be given, so that the whole question may be determined.

Conviction quashed. No costs.

[MIDDLETON, J.]

1917

Oct. 3.

RE NOLAN.

Will—Construction—Inconsistent Residuary Gifts—Effect Given to Later one.

The rule that where two clauses in a will are repugnant and incapable of reconciliation the later must prevail applies to inconsistent residuary clauses. But, if there are two gifts in the same instrument, each sufficient to include the residuary estate, in a case where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred—i.e., the “rule of thumb” is not applicable because a meaning can be attributed to the last clause which removes the apparent repugnancy.

After giving many substantial specific legacies, a testator in his will said: “The residue of my estate to go to the deserving poor of F.” Then followed this clause: “Balance of my estate divided between those in the will *pro rata*.”—

Held, that the two clauses were hopelessly inconsistent, and effect must be given to the last gift as the last intention of the testator.

Review of the authorities.

MOTION by the executors of Thomas Nolan, deceased, for a summary determination of a question arising as to the construction of the will of the deceased.

September 29. The motion was heard by MIDDLETON, J., in the Weekly Court at Ottawa.

W. D. Hogg, K.C., for the executors.

G. F. Henderson, K.C., for certain legatees.

M. J. Gorman, K.C., for the Roman Catholic Bishop in whose diocese a place referred to in the will as “Fermoy” is situated.

October 3. MIDDLETON, J.:—Thomas Nolan died on the 10th June, 1917, having first made his will on the 12th February, 1917. The will is on a printed form, and this form was apparently filled in by the testator without skilled assistance—a fact which accounts for the indiscriminate mingling of technical and in-artificial language. The whole difficulty is caused by two clauses, in the handwriting of the testator, which cannot be reconciled.

After giving many very substantial specific legacies, he provides: “The residue of my estate to go to the deserving poor of Fermoy through the Bishop Roman Catholic.”

In the following clause, intended by the framer of the printed form to be used for the naming of the executors only and the

Middleton, J.

1917

RE

NOLAN.

defining of their powers, there is inserted this provision: "Balance of my estate divided between these in the will *pro ratâ*."

It is not argued that the misplacing of this clause deprives it of its due significance.

Mr. Henderson contends that the well-known rule of construction applies, and that, the clauses being incapable of reconciliation, the latter prevails.

Mr. Gorman, on the other hand, while admitting that the two clauses are hopelessly inconsistent, contends that the rule should not be applied to inconsistent residuary clauses, but that the earlier should operate, leaving the later also to operate upon anything that may escape the net of the first clause.

The rule itself is of great antiquity, and though, as I have pointed out elsewhere,* it seems to have no real foundation, it must be accepted without question.

In Coke's Commentary it is said of divers devises of one thing in a will: "The last devise taketh place. *Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est.*" Co. Litt. 112b.

In *Paramour v. Yardley* (1579), Plowd. 539, 541, the rule is clearly stated, and the duty of the Court is said to be to endeavour by all means to construe the clauses so as to avoid repugnancy, "and so both parts of the will shall stand together, and good sense shall be made of them, and the testator's intent shall be observed throughout," but if there is "repugnancy in the will the last part . . . destroyed the first . . . For as the last will repeals the first will, so by the same reason the last part of the will shall repeal the first part of the will, when they are contrary to each other."

In *Morrall v. Sutton* (1845), 1 Ph. 533, Coleridge, J., says (pp. 545, 546): "This rule must not be acted on so as to clash with another paramount rule, which is, that before all things we must look for the intention of the testator as we find it expressed or clearly implied in the general tenour of the will; and when we have found that on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last, indifferently; and this rests upon good reason; for although, when there are repugnant dispositions,

* See *Re Stocks* (1916), 11 O.W.N. 212.

Middleton, J.

1917

RE
NOLAN.

and nothing leads clearly to a preference of one or rejection of the other, convenience is strongly in favour of some rule, however arbitrary, yet the foundation of this rule, as of every other established for the interpretation of wills, obviously is, that it was supposed to be the safest guide under the circumstances to the last intention of the testator. To consider it merely arbitrary would be unnecessarily to suppose an anomaly in the canons by which wills are interpreted."

This rule, called by Jessel, M.R., a rule of thumb (*In re Bywater* (1881), 18 Ch. D. 17, 20), was thus adopted as an alternative to declaring both provisions void and meaningless, and so leaving the testator intestate as to the property because he has twice devised it. The only way to avoid this absurdity was "by taking the subsequent words as an indication of a subsequent intention. The Court is in a dilemma; and cannot act at all, unless they do that:" *Sims v. Doughty* (1800), 5 Ves. 243, 247.

In none of the cases in which the general rule is formulated do I find any trace of the qualification suggested by Mr. Gorman in his very interesting argument. Nor can I see any room for it in the reason upon which the rule is based, unless it can be said that there is no repugnancy between two residuary gifts. No case seems to me to warrant this exception to the general rule, and in none of the recognised text-books on the subject is it suggested.

I venture to think that the true rule is found in Halsbury's Laws of England, vol. 28, p. 678—a statement of the greater weight as it has the imprimatur of the Right Hon. Richard E. Meredith, late Master of the Rolls in Ireland, and the cases which most support the wider contention are cases in the Irish Courts: "If there are two gifts in the same instrument, each sufficient to include the residuary estate, in cases where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred."

This proposition is supported by the very cases cited to me.

This, it will be observed, is only a particular application of the general rule, as I have quoted it. The rule of thumb is not applicable because the Court has been able to attribute to the words of the last clause a meaning which removes the apparent repugnancy.

Middleton, J.]

1917

RE

NOLAN.

In some of the cases the Court had indicated that the repugnancy might be avoided by holding that lapsed legacies fell into the second gift, the first residue being that which would remain if all the legacies given were valid. In *In re Isaac*, [1905] 1 Ch. 427, Buckley, J., held that lapsed legacies fell into the first residue. Confronted with the argument that this wiped out all upon which the second gift could operate and created a repugnancy, and so reduced the earlier words to silence, he answers (p. 430): "Is it possible, without doing this, to give a proper effect to the later words? In my judgment it is, because if the prior gift of one or more of the shares of 'the remainder' were to fail, owing to a lapse by the death of the legatee in the lifetime of the testator, the subsequent disposition . . . would take effect . . . and under the second disposition the residuary legatee would take something."

In accordance with this principle, where there might be lapsed legacies, and it was assumed that these would fall into the second residue, a residuary gift was not defeated by the appointment of a "residuary legatee." *Johns v. Wilson*, [1900] 1 I.R. 342.

This decision was largely based upon *In re Jessop* (1859), 11 Ir. Ch. R. 424. The testatrix gave all her property to a sister Sally, and then, after a few minor legacies, made Sally and another "residuary legatees." These ambiguous and uncertain words were held not sufficient to defeat the intention "clear and precise" to benefit the sister. The material thing is, that in the view of the Court there was no repugnancy.

Re Spencer (1886), 54 L.T.R. 597, was a case in which Bacon, V.-C., based his decision upon the ground that the second gift would operate upon lapsed legacies. *Kilvington v. Parker* (1872), 21 W.R. 121, was a case determined by the same Judge upon the ground that there was no repugnancy. *Davis v. Bennet* (1861), 30 Beav. 226, a decision of Sir John Romilly, is very scantily reported, but is based upon the idea that the last gift would operate upon lapsed legacies.

In re Isaac, *supra*, shews that lapsed legacies would fall into the first gift, and that the second gift cannot now be supported unless the first gift is such as to be capable of lapsing in whole or in part so as to create in this way a possible subject-matter upon which the second gift may operate.

In this will I have sought anxiously and in vain for any clue to the testator's intention, and for some way in which repugnancy might be avoided; but I can find no key to the real intention, and so am driven, in this dilemma, to apply this rule and to give effect to the last residuary gift as the last intention of the testator. The will is so full of interlineations and changes that I am inclined to think that the last clause was in truth the last intention, and that the testator intended to "hark back" and limit the amount to be given to the poor of Fermoy, but neglected to do so; but the will must be interpreted solely by what is written.

Costs out of the estate.

Middleton, J.

1917

RE
NOLAN.

[IN CHAMBERS.]

1917

REX v. GRASSI.

Oct. 4.

Ontario Temperance Act—Magistrate's Conviction for Unlawful Sale of Intoxicating Liquor—6 Geo. V. ch. 50, sec. 40—Evidence—Sufficiency—Testimony of Police Officers as to Complaints—Inadmissibility—Effect on Mind of Magistrate—Testimony of Witness not Interpreted into Language of Defendant—Absence of Prejudice—Liquor Found on Premises—Presumption—Absence of Search-warrant—Finding of Magistrate.

Upon a motion to quash a magistrate's conviction of the defendant for selling intoxicating liquor, contrary to sec. 40 of the Ontario Temperance Act, 6 Geo. V. ch. 50:—

Held, that there was evidence before the magistrate sufficient to justify the conviction.

- (2) That, although evidence that complaints were made to the police to the effect that intoxicating liquor was being sold in the defendant's house was improperly admitted, it would not be fair to say that the inadmissible statements might have had some influence upon the magistrate's decision; for the evidence as to the alleged sale was conclusive, if believed, and no credible explanation was given of the presence in the defendant's house of a large quantity of intoxicating liquor.
- (3) That there is no rigid rule that in every case all the evidence shall be made intelligible to the accused; and the objection that the evidence of a Polish witness, while translated into English, was not translated into Italian, which was said to be the only language that the accused understood, was overruled, it not being shewn that the accused suffered any prejudice in that regard.
- (4) That the magistrate in convicting did not act upon any statutory or other presumption, but simply drew his conclusions from the facts proved; and, therefore, there was no ground for the objection that the finding of liquor upon the premises raised no presumption against the accused because the police officers who found it had no search-warrant and no authority to enter the house.

MOTION to quash a conviction of Settina Grassi, an Italian woman, made by the Police Magistrate for the City of Hamilton,

1917
REX
v.
GRASSI.

on the 20th July, 1917, for selling intoxicating liquor, contrary to the provisions of sec. 40 of the Ontario Temperance Act, 6 Geo. V. ch. 50, which is as follows: "No person shall by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly sell or barter or, in consideration of the purchase or transfer of any property or thing, give to any other person any liquor without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license and as prescribed by this Act."

August 23. The motion was heard by ROSE, J., in Chambers.
M. J. O'Reilly, K.C., for the defendant.
Edward Bayly, K.C., for the magistrate.

October 4. ROSE, J.:—The first objection is, that there was no evidence sufficient to justify the conviction. A perusal of the depositions satisfies me that the evidence was quite sufficient.

The second objection is, that evidence was improperly received that complaints had been made that liquor was being sold in the house of the accused.

On the occasion in question a man was seen to enter the house, and the defendant was seen to kneel down and lift something which was afterwards found to be the oil-cloth covering an opening in the floor, and to take out something which the witnesses did not see. The two were then seen making signs to each other, as if they had no common language, and the man was seen to leave the house. He was followed, and a bottle of intoxicating liquor was found in his possession. At the trial he swore that he had bought the liquor in a house which, and from a woman whom, he could not identify, because it was dark at the time. The constable who gave evidence as to what he had seen accounted for his presence in front of the house by saying that on several occasions the police had had complaints about the house and that he was watching it. Another police officer, who with the last mentioned witness searched the house and found much intoxicating liquor, said that there had been "very bitter complaints from respectable citizens in that neighbourhood" that liquor was sold in the house. This is the evidence complained of. It was irrelevant and ought not to have been given, but, apart

from it, the evidence for the prosecution was conclusive, if believed, and the attempted explanation by the accused of the presence of so much liquor in the house was absurd; so that I do not think that it would be fair to say that the inadmissible statements may have had some influence upon the magistrate's decision, or may have affected his mind in regard to the guilt or innocence of the accused. This objection fails.

The third objection is, that the evidence of a Polish witness, while translated into English, was not translated into Italian, which is said to be the only language that the defendant understands. I do not know whether the evidence of the English-speaking witnesses was translated into Italian, but no objection is raised in respect of it. The defendant was represented by counsel who cross-examined the Pole; there was an Italian interpreter present; there is no suggestion that the defendant's counsel made any request that the statements of the witness should be translated into Italian; so that there is not much ground for saying that the defendant suffered any prejudice in this regard. That being so, no effect ought to be given to the objection unless there is a rigid rule that in every case all the evidence shall be made intelligible to the accused. There does not seem to be any such rule: *Rex v. Meceklette* (1909), 18 O.L.R. 408; *Rex v. Sylvester* (1912), 45 N.S.R. 525; *Rex v. Pfister* (1911), 3 O.W.N. 440. This ground fails.

The remaining objection is, if I understand it, that the finding of liquor upon the premises of the accused did not raise any presumption against her, because the officers had no search-warrant and no authority to enter the house. I do not find any basis for this objection. In what the magistrate said there is no suggestion that he relied upon any statutory or other presumption: it is a simple case of drawing the correct conclusion from the facts proved, facts which the magistrate states as follows: "He (the Pole) says he bought the liquor; the constables saw the actions of the woman, and they find the man coming out with the liquor: saw him go in, in fact, and come out again."

The motion will be dismissed with costs.

Rose, J.

1917

REX

v.

GRASSI.

1903

[IN THE COURT OF APPEAL.]

June 29.

DODGE v. SMITH.

Limitation of Actions—Mineral Lands—Reservation in Deed—Estoppel—Tenancy—Payment of Taxes—Further Evidence Given on Appeal.

APPEAL by the plaintiffs from the judgment of a Divisional Court of the High Court, 3 O.L.R. 305, reversing the judgment of LOUNT, J., at the trial, and dismissing the action, which was brought to restrain the defendants from trespassing upon land by, working mines thereon, and to recover damages.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN GARROW, and MACLAREN, JJ.A.

A. B. Aylesworth, K.C., for the appellants.

G. H. Watson, K.C., for the defendants, respondents.

June 29, 1903. The judgment of the Court was read by MOSS, C.J.O., who stated that, upon leave given by the Court of Appeal, further evidence had been adduced on behalf of the appellants and evidence also adduced in answer on behalf of the respondents; and, upon the whole case, the determination of the Court was, that the judgment below should be reversed, and judgment should be entered for the appellants.

The reasons are given in a report of the case in the Ontario Weekly Reporter : *Dodge v. Smith* (1903), 2 O.W.R. 561.

[Apparently by oversight, no report or note of the judgment of the Court of Appeal has hitherto appeared in the Ontario Law Reports.]

[APPELLATE DIVISION.]

1917

Oct. 5.

BRODERICK v. MCKAY.

Bastard — Maintenance — Form of Affidavit of Affiliation — “Really” — Illegitimate Children’s Act, sec. 3.

An action brought by the mother of an illegitimate child against the reputed father for necessities supplied to the child was *held* to have been properly dismissed on the ground that the affidavit of paternity filed by the plaintiff did not comply with sec. 3 of the Illegitimate Children’s Act, R.S.O. 1914, ch. 154, in that it did not declare that the defendant was “really” the father, but merely that he was the father, of the child.
Jackson v. Kassel (1867), 26 U.C.R. 341, approved.

APPEAL by the plaintiff from the judgment of the Senior Judge of the County Court of the County of York, dismissing an action brought by the mother of an illegitimate child against the reputed father for necessities supplied to such child. The action was dismissed by the County Court Judge, on the ground that the affidavit of paternity filed by the plaintiff did not comply with the Illegitimate Children’s Act, R.S.O. 1914, ch. 154,* sec. 3, in that it did not declare that the defendant was “really” the father, but merely that he was the father, of the child, following the decision of the Court of Queen’s Bench in *Jackson v. Kassel* (1867), 26 U.C.R. 341.

October 5. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

C. H. Porter, for the plaintiff, argued that *Jackson v. Kassel* should not now be followed, as, since it was decided, the Judicial

* Sections 2 and 3 of the Act are as follows:—

2.—(1) Any person who furnishes food, clothing, lodging or other necessities to any child born out of lawful wedlock may maintain an action for the value thereof against the father of the child, if the child was a minor at the time the necessities were furnished, and was not then residing with and maintained by his reputed father as a member of his family.

(2) Where the person suing for the value of the necessities is the mother of the child, or a person to whom the mother has become accountable for the necessities, the plaintiff shall not be entitled to recover unless the fact of the defendant being the father is proved by other testimony than that of the mother, or her testimony is corroborated by some other material evidence of that fact.

3. No action shall be sustained under the next preceding section unless it is shewn upon the trial thereof that while the mother of the child was pregnant with, or within six months after the birth of the child, she had voluntarily made an affidavit before a Justice of the Peace for the county, district or city in which she then resided declaring that the person afterwards charged in the action is *really* the father of the child, nor unless such affidavit was deposited, within that time, in the office of the clerk of the peace of the county or district, or of the clerk of the council of the city.

App. Div.
1917
BRODERICK
v.
McKAY.

ture Act, and the Interpretation Act, R.S.O. 1914, ch. 1, sec. 10, had come into force, under which all Acts were to be deemed remedial, and should receive such a fair and liberal construction as would best ensure the attainment of the objects aimed at. He referred to *Emerson v. Bannerman* (1891), 19 S.C.R. 1; *Northcote v. Brunker* (1887), 14 A.R. 364, 378; *Burkill v. Thomas*, [1892] 1 Q.B. 99, 312; *Bosley v. Davies* (1875), 1 Q.B.D. 84, cited in Maxwell's Interpretation of Statutes, 5th ed., p. 521.

H. H. Shaver, for the defendant, was not called upon.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.O.:—Mr. Porter has argued this case very fully and ably; but it is necessary in order to give effect to his contention that we should overrule the well-considered judgment of a strong Court, as far back as 1867, which is conclusive against him, *Jackson v. Kassel*, 26 U.C.R. 341, a case too which has been spoken of with approval at a later date by a Judge of the Court of Appeal: *Northcote v. Brunker*, 14 A.R. 364, 378. I do not think we can do that. The correctness of the decision has stood unchallenged for 50 years, and during that time there has been no suggestion that it was wrongfully decided.

It is not without significance, too, that the Legislature, with the knowledge of that decision, has made no change in the Act. One would have thought that, if the Legislature has been of the opinion that the word "really" added nothing to the section, it would have been stricken out; instead of that, the section has been re-enacted in each of the revisions of the statutes that have been subsequently made.

The appeal must be dismissed.

Appeal dismissed with costs.

[IN CHAMBERS.]

1917

Oct. 9.

RE D.

Lunatic—Person Incompetent to Manage his Estate—Lunacy Act, sec. 37—Appointment of Guardian—Authority to Continue Subscriptions to Charitable and Philanthropic Schemes—Jurisdiction of Court—Sec. 12 of Act.

The Court has, under sec. 12 of the Lunacy Act, R.S.O. 1914, ch. 68, wide powers for the management and administration of the estate of a lunatic or person declared incompetent under sec. 37, "for the maintenance or benefit of the lunatic or of his family;" and these words ought to be construed liberally; but, where what is sought is the disbursement of large amounts for the benefit of schemes and projects which, though charitable and philanthropic and worthy of support, cannot be regarded as falling within these words, the sanction of the Court cannot be given.

In England the jurisdiction in lunacy is not limited by statute as in Ontario, and no English case goes far enough to warrant the granting of what was sought in this case—authority to the guardians of a person declared incompetent under sec. 37, to pay, out of his estate, sums for the support of charitable and philanthropic schemes the same or similar to those which he had liberally supported when competent. ✓

AN order having been made under sec. 37 of the Lunacy Act, R.S.O. 1914, ch. 68, declaring D. incompetent to manage his own property and estate, and appointing guardians thereof, *M. L. Gordon*, for the petitioner, upon the settlement of the order, asked that it should contain a clause giving the guardians authority to continue the payment, out of the estate of D., of money for the support of charitable and philanthropic schemes, the same as or similar to those which he had liberally supported when competent.

October 9. MIDDLETON, J.:—A wealthy and public-spirited man has been declared incompetent under the Lunacy Act, R.S.O. 1914, ch. 68, sec. 37.* Upon the settlement of the order appointing guardians of his estate, authority is sought to continue charitable and philanthropic subscriptions similar to those made by him when competent, more particularly subscriptions to patriotic and Red Cross funds.

The Court has, under sec. 12* of the Act, wide powers for the management and administration of the estate of a person declared

* The provisions of sec. 37 and of sec. 12 are as follows:—

37.—(1) The powers and provisions of this Act relating to management and administration shall apply to every person not declared to be lunatic with regard to whom it is proved, to the satisfaction of the Court, that he is, through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs.

Middleton, J.

1917

RE
D.

incompetent "for the maintenance or benefit of the lunatic or of his family;" and, no doubt, these words ought to be and have been in practice construed most liberally; but, where what is sought is the disbursement of large amounts for the benefit of schemes and projects undoubtedly worthy, but which cannot by any stretch of the imagination be regarded as falling within these words, I fail to find any jurisdiction under the statute for judicial sanction.

English cases have been cited, but with respect to them there are two comments: first, in England the jurisdiction in lunacy is not limited as our jurisdiction is by the statute, but is founded upon the ancient jurisdiction of the Lord Chancellor; and, secondly, no case cited goes anything like as far as what is here sought.

In Halsbury's Laws of England, vol. 19, p. 438, it is said that allowances may be made to relations for whom the lunatic is not bound to provide, the Court being guided by what the lunatic would probably have done if sane. Such allowances, particularly when originated by the lunatic, are, when paid to persons as to whom he stood *in loco parentis*, authorised almost as a matter of course when the estate is ample, but may be originated by the Court even where this relationship does not exist, when claims for special consideration can be put forward.

In *In re Darling* (1888), 39 Ch. D. 208, the Court puts the matter upon a sound basis. Legal and moral claims of relations are recognised—the Court considering what the lunatic would

(2) The provisions of this section shall apply although the person is not a lunatic.

(3) Such of the powers of this Act as are made exercisable by the committee of the estate under order of the Court shall be exercised in the cases provided for by sub-section 1 by such person, in such manner, and with or without security, as the Court may direct, and any such order may confer upon the person therein named authority to do any specified act or exercise any specified power, or may confer a general authority to exercise on behalf of the person to whom the order relates, until further order, all or any such powers without further application to the Court.

(4) Every person appointed to do any such act or exercise any such power shall be subject to the jurisdiction and authority of the Court as if such person were the committee of the estate of a lunatic so declared.

(5) Section 12 of this Act shall apply to the cases provided for by sub-section 1, and the person in respect of whom the order is made, and any person aggrieved or affected by the order shall have the like right to appeal therefrom as is provided for by section 6.

12. The powers conferred by this Act as to the management and administration of a lunatic's estate shall be exercisable in the discretion of the Court for the maintenance or benefit of the lunatic or of his family or where it appears to be expedient, in the due course of management of the property of the lunatic.

probably have done as to such claims himself—"But it is not our business to deal benevolently or charitably with the property of the lunatic, and in my opinion it would be wrong for us to do so:" *per* Cotton, L.J., at p. 211.

Allowances to old servants and retainers have been placed upon the same footing as payments to members of the family: *In re Earl of Carysfort* (1840), Cr. & Ph. 76.

In *In re Evans* (1882), 21 Ch. D. 297, the reluctance of the Court to make payments to relatives for whom the lunatic was under no legal obligation to provide was emphasised. It was stated that the practice was to be narrowed rather than extended.

The only case of a subscription to a charitable purpose cited was *In re Strickland* (1871), L.R. 6 Ch. 226. The heiress of the lunatic and his sole next of kin was his committee, and sought leave to subscribe £250 towards building a church and £250 towards schools to be built upon property sold by the committee as a site for the church and schools, at an advantageous price. She owned about 70 houses in the immediate neighbourhood. The Master had refused the order, as he thought he had no power, and a petition was presented to the Lords Justices, who "made the order," no reason being given. Counsel cited *Oxenden v. Lord Compton* (1793), 2 Ves. Jr. 69; *Ex p. Whitbread* (1816), 2 Mer. 99.

The former case relates to the effect of conversion by a committee upon the rights of the real and personal representatives of a deceased lunatic. In the course of the judgment it is stated that the committee may and should do in the management of the estate all that a prudent owner would do.

Ex p. Whitbread was the case of an allowance to relatives, and the statement is made (2 Mer. at p. 103): "The Court will not refuse to do, for the benefit of the lunatic, that which it is probable the lunatic himself would have done."

This, in view of the other cases, cannot be read as sanctioning all that might be brought within the words used, but must be confined to the matter there under discussion.

If shewn that a lunatic speculated upon the stock-market, could the Court for that reason sanction speculation by his committee?

Middleton, J.

1917

RE
D.

1917

[MIDDLETON, J.]

Oct. 9.

UNION BANK OF CANADA v. MAKEPEACE.

Assignments and Preferences—Assignment for Benefit of Creditors under Assignments and Preferences Act—Creditor Holding Mortgage as Security—Valuation of, at Amount of Claim—Release of Equity of Redemption—Effect upon Right of Creditor against Surety for Part of Claim—Right to Credit in Account—Guaranty—Satisfaction—Discharge.

A creditor holding security from a surety cannot, by any dealing to which the surety is not a party, change or prejudice the position of the surety without discharging him; but, when a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security. All the surety is then entitled to is a credit upon the account of the true value of the security improperly released.

Taylor v. New South Wales Bank (1886), 11 App. Cas. 596, followed.

The defendant by a written instrument guaranteed the plaintiff bank to the extent of \$2,500 in respect of advances to be thereafter made by the bank to a certain company—the guaranty to cover the ultimate balance. The company afterwards made an assignment for the benefit of its creditors, under the Assignments and Preferences Act. The assignee took nothing of value under the assignment, all the company's property having been hypothecated to the bank. The bank proved its claim with the assignee at \$13,707.39, and valued its securities at the same amount—\$250 being the value given assigned book-debts and \$13,457.39 the value given to mortgages on land and chattels. The bank having begun an action of foreclosure, the assignee offered to release the equity of redemption for \$300. The bank paid the assignee \$300 and accepted the release, and also abandoned to the assignee all claim upon the book-debts remaining unpaid. All claims of the bank upon the estate in the hands of the assignee were withdrawn:—

Held, that the defendant, the surety, was not thereby discharged: there was no damnification of the surety, because the bank had no right to share, and there was no estate in which it could share.

Semble, that if the bank at some future time should seek to add the \$300 as a prudent payment, in lieu of the costs of a foreclosure suit, some question of amount might arise; and the releasing of the uncollected book-debts might give the surety the right to a credit in accounting; but the mortgages and book-debts were security for the whole debt and not merely for the portion for which the defendant was liable, and any credits might well be made only upon that part for which she was not liable.

It was contended that the bank's valuation of the securities extinguished the debt; but the assignee's relinquishment of the right to redeem did not interfere with the right of the creditor to sue the mortgagor, nor *à fortiori* did it deprive the creditor of its rights against the surety.

Bell v. Ross (1885), 10 A.R. 458, distinguished.

Rainbow v. Juggins (1880), 5 Q.B.D. 422, followed.

Differences between the Ontario Assignments and Preferences Act, the repealed Insolvent Act of Canada (upon which *Bell v. Ross* was decided), and the English Bankruptcy Act, 1883, pointed out.

And *held*, that the defendant had not been discharged from her liability as surety for the indebtedness of the company, by reason of any payment or satisfaction of such indebtedness.

AN issue directed by an order of the Court to be tried.

September 28. The issue was tried by MIDDLETON, J., without a jury, at Toronto.

W. N. Tilley, K.C., and *D. C. Ross*, for the plaintiff bank.
W. S. MacBrayne, for the defendant.

Middleton, J.

1917

UNION
BANK OF
CANADA

v.
MAKEPEACE.

October 9. MIDDLETON, J.:—Trial of an issue under an order of the 20th September ult., to determine the question whether the plaintiff is precluded from asserting any claim against the defendant by reason of the conveyance to the plaintiff of the equity of redemption in the mortgaged premises, and the plaintiff's abandonment of its right to rank against the estate of the debtor.

The bank (the plaintiff), having made large advances to the Specialty Manufacturing Company of Grimsby and contemplating further advances, took a guaranty from the defendant for \$2,500 for advances to be thereafter made, the guaranty to cover the ultimate balance.

In another forum the question of the amount due upon the guaranty, apart from the contention now before me for consideration, has been ascertained.*

On the 9th April, 1915, the debtor (the manufacturing company) assigned for the benefit of its creditors, under the provisions of the Assignments and Preferences Act, R.S.O. 1914, ch. 134. The assignee took nothing of value under this assignment, as all the debtor's property had been hypothecated to the bank.

At a meeting of the creditors, it was decided to sell the equity of redemption for \$300, if any one could be found to assume the bank's claim.

The bank adopted a very peculiar course: it proved its claim at \$13,707.39, and valued its securities at the same amount—\$250 being the value given assigned book-debts and \$13,457.39 the value given to the mortgages on land and chattels.

The mortgage upon the land was supposed to cover the fixed machinery, and the chattel-mortgage to be taken on all machinery as additional protection.

No purchaser was found by the assignee; and, when an action for foreclosure was begun by the bank, the hoped-for \$300, which was the only source for payment of his fees, inspectors' fees, and the costs of the assignment, seemed impossible of realisation.

The assignee then made an appeal to the compassion of the bank, and offered it a release of the equity of redemption for \$300,

*See *Union Bank of Canada v. Makepeace* (1917), 12 O.W.N. 397.

Maddleton, J.

1917

UNION
BANK OF
CANADA
v.

MAKEPEACE.

which he said would be less than the costs of foreclosure. Finally the bank agreed to this, and also agreed to abandon to the assignee all claim upon the book-debts then remaining uncollected. It has not been shewn that these had any real value.

On the 13th November, 1915, a quit-claim deed was given of the land; and, later, to confirm the bank's title, a release of the chattels; and all claims upon the estate in the hands of the assignee were withdrawn.

This, it is now said, has discharged the surety.

I cannot agree with this contention.

If the more technical aspects of the case are laid aside for the present, the situation seems simple. The bank is creditor for a large claim. The bank holds as security for all its claims a mortgage upon the factory and its contents; it has also a security for the ultimate balance due it upon advances made after the date of the guaranty, the defendant's bond for \$2,500.

When the assignment was made, the bank became entitled to share in the distribution of the property which came to the hands of the assignee, according to the terms of the deed and statute.

The bank had the right to file its claim and to value its security, and the surety could not in any way control its action. When the claim was filed, and the security was valued at the amount of the claim, the bank was shewn to have no right to share in any money which the assignee might receive. The abandonment of the right to rank as an unsecured creditor, or the release of any claim against the estate in the hands of the assignee, was therefore something which did not prejudice the surety.

As I understand the law, a creditor holding security from a surety cannot, by any dealing to which the surety is not a party, change or prejudice the position of the surety without discharging him; but, when a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security. All the surety is then entitled to is a credit upon the account of the true value of the security improperly released: *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596, 603. Here there was no damnification of the surety, because the bank had no right to share, and there was no estate in which it could share.

If the bank at some future time should seek to add the \$300 as a prudent payment, in lieu of the costs of a foreclosure suit, some question of amount may arise.

Also the releasing of the uncollected book-debts, if they had any value, may give the surety the right to a credit in accounting. But the mortgages and book-debts were security for the whole debt, and not merely for the portion for which the defendant was liable, and any credits might well be made only upon that part for which she is not liable.

Turning now to Mr. MacBrayne's more technical contentions: he contends that the valuation of the securities extinguished the debt; that the valuation amounts to an offer to accept the security for the sum named, and the failure of the assignee to exercise his right to take over, amounts to an acceptance, and in this way there is effected a release of the debtor.

Bell v. Ross (1885), 11 A.R. 458, is relied on as establishing this. That was a case under the old insolvency law. A claim was filed, security valued, and, though no formal election was made by the assignees to allow the creditor to retain his security, matters proceeded as if such election had been made. The security was a timber-limit; and the creditor, assuming that he had thus become absolute owner (the transfer to him being absolute in form, though intended as security only), operated the limit and cut and marketed the timber. After all this, the assignee brought an action for an accounting, and this was refused, the Court holding that on the facts an election to allow the creditor to retain the security at the valuation must be presumed, and that, when such election is made, the assignee cannot thereafter redeem. The right of the creditor as against sureties was not discussed in any way, and I venture to think it is most dangerous to rely upon general statements, made *alio intuitu*, as conclusive.

The section in the Insolvency Act is very like the section in the Assignments and Preferences Act, and any case which interpreted the language of the earlier Act would be a guide to the interpretation of the section in the present statute; but it would by no means follow that the effect of something done under a trust for the distribution of the debtor's assets would be the same as the effect of the same thing done in the course of a bankruptcy proceeding.

Middleton, J.

1917

UNION
BANK OF
CANADA

v.

MAKEPEACE.

Middleton, J.
1917
UNION
BANK OF
CANADA
v.
MAKEPEACE.

Under our law, the assets of the debtor conveyed by him to the assignee upon trust are distributed in the mode provided by the Act. The liability of the debtor to his creditors in the meantime remains as it was. When the creditor receives a dividend, his claim is reduced *pro tanto*, but in the meantime the trust estate is a security only.

Under the Insolvency Act the situation is far different. The debtor's property is given to or taken by the assignee, and all personal remedies against the debtor are suspended, and the end of the proceedings is the discharge of the debtor from his bankruptcy freed and discharged of his creditors' claims. The creditors are by force of law compelled to take in satisfaction such dividends as they can obtain as the result of the proof of their claims. If the statute permits a valuation of securities for part and a ranking for the balance, then, so far as the debtor was concerned, this ranking worked his discharge from the debt.

Now, in insolvency, the assignee represents the debtor in quite a different way from any in which it can be said that an assignee under our Act does. Under the assignment in question the assignee had the right to sell the property and distribute the proceeds. The statute gave him the right to redeem this mortgaged property upon paying (out of the estate) the value attached by the creditor plus 10 per cent., instead of paying the amount due on the mortgage; but his relinquishment of the right to redeem did not, it seems to me, in any way interfere with the right of the creditor to sue the mortgagor, nor *à fortiori* did it deprive the creditor of its rights against the surety.

Rainbow v. Juggins (1880), 5 Q.B.D. 422, seems to me to afford, as the result of the reasoning there used, a complete answer to the contention.

The defendant's obligation to be answerable for the ultimate balance of the debt must be taken to be an obligation with reference to the law of the land, and subject to the law which calls upon or permits the creditor to rank and value his security as he thinks best for his own protection.

Then, the assignee having accepted the valuation without having elected to take over the property, is the position in any way changed by the giving of the formal release of the equity of redemption? I cannot see that it is. Naturally the creditor re-

quired some document capable of registration so that there might be finality. There was not sought nor given any release of the debtor.

All that was done was, that the assignee formally renounced the worthless right to redeem he had already lost, and the creditor formally withdrew a right to rank, which did not exist, against an estate which amounted to nothing. *Ex nihilo nihil fit*.

The whole argument seems to me an attempt to import into a simple and reasonable transaction a meaning the parties never had and to give to it an effect that was never contemplated. Sometimes this results, and creditors have often discharged sureties without intending to do so; but the better view now prevails; and, where the right against a surety might be preserved by express reservation, this reservation may be implied: *Gorman v. Dixon* (1896), 26 S.C.R. 87. In the same way, no merger would be implied from the conveyance of the equity of redemption: *Thorne v. Cann*, [1895] A.C. 11.

It may save confusion hereafter if I point out that our Insolvency Act and our Assignments Act differ widely from the English Bankruptcy Act, 1883. The 2nd schedule, dealing with proof of debts, provides, *inter alia*, that securities shall be valued and (sec. 12 (c)) that the creditor may give notice to the assignee requiring him to exercise his rights of redemption or sale within 6 months; and then, upon default of election or the exercise of the right after election, the equity of redemption shall vest in the creditor. Under our statute the right of election may well be lost, as in *Bell v. Ross* (*supra*), but there may still be such an outstanding estate in the assignee as to make some action by way of foreclosure necessary.

The right to redeem based upon the valuation may well be gone, but the right to redeem apart from the statute might still subsist—an aspect of the case not presented or considered in the case cited.

For these reasons, I find, upon the issue presented, that the defendant has not been discharged from her liability as surety for the indebtedness of the Specialty Manufacturing Company to the plaintiff, by reason of any payment or satisfaction of such indebtedness.

And I direct the defendant to pay the costs of the motion resulting in the order of the 20th September and of this issue, to the plaintiff.

Middleton, J.

1917

UNION
BANK OF
CANADA
v.

MAKEPEACE.

1917

[CLUTE, J.]

Oct. 11.

STARK v. SOMERVILLE.

Contract—Brokers—Dealings in Company-shares for Customer—Actual Transactions—Authority of Customer—Advances—Purchases—Sales—Credits—Account—Payments—Limitations Act—Starting-point.

The plaintiffs, who were stockbrokers, during the period from September, 1904, to November, 1906, bought and sold shares in various companies for the defendant. In 1904, the parties made an agreement, which applied to all existing and future transactions, and was to the effect that all moneys advanced to the defendant or paid on his account should be repayable on demand with interest; that the plaintiffs should be at liberty to hypothecate all stocks and securities deposited by the defendant with them as security for advances; that the defendant should keep a cash margin of the quoted value of the stocks as security for the account; and that, if the defendant failed to pay any indebtedness upon demand, or to keep up the margin, the plaintiffs should be at liberty, without notice, to sell all or any of the stocks or securities held by them on the defendant's account, and to apply the proceeds towards the payment of the indebtedness, holding him responsible for any deficiency. No shares were purchased after November, 1906. From that time on, the account kept by the plaintiffs consisted of debits of interest and credits of the sales of various stocks and dividends upon stocks. The account of sales was closed in May, 1913, when the plaintiffs sold some shares. The whole account shewed a balance due the plaintiffs on the 2nd May, 1913, of nearly \$4,000, for which the plaintiffs sued in this action:—

Held, that the transactions were not illegal by reason of the prohibition of sec. 231 of the Criminal Code or otherwise, but were real transactions, purchases and sales of shares made in good faith on behalf and at the request of the defendant.

Held, also, that every payment made and credit given by the plaintiffs from the sale of shares held by them for the defendant, or payment of dividends thereon, was a payment made by the defendant upon the account as it stood when the payment was made; that each payment gave a new starting-point for the running of the Limitations Act; that there never was a time between payments when six years had elapsed; and that the Act never became effective to bar the plaintiffs' claim or any part thereof.

Chinnery v. Evans (1864), 11 H.L.C. 115, and *Cockburn v. Edwards* (1881), 18 Ch. D. 449, referred to.

The plaintiffs, stockbrokers, sued the defendant, a customer, for \$3,708.30, the balance said to be due to the plaintiffs in respect of advances made by them for the purchase of stocks, after crediting the proceeds of sales.

April 23, July 16, and September 24. The action was tried by CLUTE, J., without a jury, at Toronto.

J. Denovan, for the plaintiffs.

D. O. Cameron, for the defendant.

October 11. CLUTE, J.:—The plaintiffs are stockbrokers carrying on business in Toronto; the defendant is a gentleman residing in Toronto.

The plaintiffs set forth an agreement with the defendant dated September, 1904, in which the defendant, in consideration of financial accommodations given or to be given, agrees with the plaintiffs:—

Clute, J.

1917

STARK
v.

SOMERVILLE.

(1) That all sums of money advanced to the defendant or paid on his account shall be repayable on demand, with interest at such rate or rates as the plaintiffs may notify the defendant of from time to time.

(2) The defendant empowers the plaintiffs to hypothecate all stock and securities deposited by him with the plaintiffs as security for advances and to raise money upon them as the plaintiffs may see fit, without further consent or knowledge.

(3) The defendant agrees to keep a cash margin of not less than——per cent. of the quoted value of the stocks as security for the account. The amount of the percentage was never filled in.

(4) It is provided that, if the defendant fails to pay any indebtedness upon demand, or to keep up the margin, then, in either event, the plaintiffs are authorised (not bound) to sell, without notice, all or any of the stocks or securities held by them on the defendant's account, and to apply the proceeds of such sale towards the payment of any of his indebtedness, holding the defendant responsible for any deficiency remaining unpaid thereafter.

(5) The agreement applies to all existing and future transactions.

It appears from the evidence that the plaintiffs bought and sold stocks of different kinds, aggregating, between September, 1904, and November, 1906, hundreds of thousands of dollars. No money margin was put up, but 50 shares of "Crow's Nest" stock was put up on the 2nd and 12th September, 1904. No stock appears to have been purchased subsequent to November, 1906. From that time on, the account consists of debits of interest and credits of the sales of various stocks which had been purchased by the plaintiffs for the defendant, and dividends paid upon the stocks held by the plaintiffs, which dividends were credited to the defendant as received, and finally, in April, 1913, 38 shares of the "Crow's Nest" stock were sold, realising \$2,346.50, and on the 2nd May, 1913, the plaintiffs sold 10 shares of "Canada

Clute, J.

1917

STARK

v.

SOMERVILLE.

Salt," realising \$1,147.50, which closed the account of sales, shewing a balance due the plaintiffs on the 2nd May, 1913, of \$3,708.30. The writ of summons commencing this action was issued on the 23rd May, 1916.

The defendant pleads the Statute of Limitations, and denies ordering the purchase or sale of any of the stocks alleged to have been so purchased or sold by the plaintiffs on his behalf. He further alleges that the purchases and sales of the stock were merely colourable transactions, and never actually made; and finally pleads that, at the time the agreement above referred to was signed by him, he transferred to the plaintiffs a certain number of paid-up shares in the Crow's Nest Coal Company as security for any indebtedness he might incur to the plaintiffs as the result of his dealings through them, and directed the plaintiffs that, when his losses amounted to the market-value of the said shares at any time, they should immediately close out all stocks or shares held by him and close the account between them, and that the plaintiffs promised and agreed to do so.

I find as a fact that the purchases and sales purporting to be made on behalf of the defendant by the plaintiffs were so actually made, and were not, nor was any of them, merely colourable transactions. I further find that the defendant ordered the purchases made by the plaintiffs on his behalf, and that he authorised the greater part of the sales so made, and that no sales were made by the plaintiffs for the defendant until after proper and sufficient demand had been made for the indebtedness due them, and that such sales were made fairly under the authority of the said agreement between the plaintiffs and defendant. There may have been some conversation at the time the agreement was made in regard to the plaintiffs closing out the account when the value of the stock held as security was exhausted, but I find that it never became a part of the understood bargain between the parties, and that the subsequent purchases made by the plaintiffs were authorised by the defendant.

The principal, in fact the only, point seriously argued by the defendant's counsel was under the Statute of Limitations. He took the position that, as six years had elapsed after the plaintiffs ceased to purchase for the defendant, the indebtedness as it existed at that time was barred, notwithstanding the fact that the

account was not closed, and that the plaintiffs held a large amount of stock to be realised upon under the agreement, for payment of the account. I think it clear beyond argument that the position taken by the defendant's counsel is untenable; that every payment made and credit given by the plaintiffs from the sale of stocks held by them for the defendant, or payment of dividends thereon, was a payment made by the defendant upon the account as it stood when the payment was made; and that each payment gave a new starting-point for the statute to run; and that there never was a time between payments when six years had elapsed; and that the Statute of Limitations never became effective to bar the account or any part thereof.

Since writing the above, counsel for the defendant has furnished me with a number of cases.

Although the defendant did not plead that the business carried on by the plaintiffs for the defendant amounted simply to gambling transactions, and did not argue the question or cite authorities at the hearing, he now takes the point for the first time, in a memorandum of cases sent in by agreement of counsel, and relies upon sec. 231 of the Criminal Code, R.S.C. 1906, ch. 146, referring to *Beamish v. James Richardson & Sons Limited* (1914), 49 S.C.R. 595; *James Richardson & Sons Limited v. Gilbertson* (1917), 39 O.L.R. 423; and *Maloof v. Bickell* (1917), 13 O.W.N. 4.

The enactment referred to, as is well-known, was passed to suppress "bucket-shop" transactions, which were gambling transactions, consisting of bets made upon the rise and fall of stocks, without actual transactions taking place.

The present case differs in its facts from any of the authorities cited; and, so far from being "bucket-shop" transactions, the transactions here were real transactions, according to the evidence, in every instance, and made *bonâ fide* on behalf and at the request of the defendant.

With respect to the Statute of Limitations, it is not disputed that the statute would commence to run from the time the plaintiffs could have sued for their claim: *Reeves v. Butcher*, [1891] 2 Q.B. 509; *McFadden v. Brandon* (1903), 6 O.L.R. 247. The real question, is, whether the transactions which took place in regard to the sale of stocks and credit of the proceeds and of dividends

Clute, J.
1917
STARK
v.
SOMERVILLE.

Clute, J.

1917

STARK

v.

SOMERVILLE.

took the case out of the statute from time to time as these payments were made. The following authorities are relied upon by the defendant's counsel that such payments did not give the statute a new starting-point: *Massey-Harris v. Smith* (1904), 6 Terr. L.R. 50; *Cockburn v. Edwards* (1881), 18 Ch. D. 449, 457; *Chinnery v. Evans* (1864), 11 H.L.C. 115, at p. 133; Dos Passos on Stockbrokers, 2nd ed., p. 804; Colebrooke on Collateral Securities, 2nd ed., p. 561; *Covell v. Loud* (1883), 135 Mass. 41; *Desrosiers v. Burdon* (1906), 7 Q.P.R. 395.

In *Cockburn v. Edwards*, 18 Ch. D. 449, a solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale without notice. The solicitor took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interest on both mortgages. He then sold the property without notice. It was held that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest would not by itself prove that there was no interest in arrear if no appropriation was shewn to have been made. Jessel, M.R., points out (p. 456) that it was argued that a mortgagee in possession, if he receives rents to an amount more than sufficient to pay the interest, must be taken to have been paid his interest, and says, "I cannot accede to that argument." The case is referred to for the observations at p. 457, where he quotes the Vice-Chancellor as saying: "In this case it has been said that the remedy of the plaintiffs as general creditors, if they ever had any, has been barred by the Statute of Limitations, and that the receipt of rent by them is not a payment within the meaning of the proviso of that statute. But my opinion is, that, if an equitable mortgagee enters into possession of an estate and receives the rents of it, such receipt ought *primâ facie* to be taken as payment for all the principal or interest of his debt, as the case may be." The Master of the Rolls then says: "The observation that receipt of rents is *primâ facie* payment is a mere *dictum* . . . If the *dictum* was correct, it would follow that the mortgagee still had the rights of a general creditor. But the receipt of rents by the mortgagee is not a payment by the mortgagor, or by any one on his behalf. The mortgagee receives rents which are his own, subject, of course, to the right of redemption; he is not receiving interest or principal,

but receiving the rents of property which belongs to him subject to the right of the mortgagor to redeem it. The case of *Chinnery v. Evans*, 11 H.L.C. 115, shews that the *dictum* is wrong."

In the case of *Chinnery v. Evans*, a mortgagor, with three estates, being in default in the payment of interest, a receiver was appointed. He entered into possession of one of the estates, from which alone he took the money necessary to keep down the interest on the mortgage. The mortgagor afterwards sold one of the estates, and, after the lapse of 20 years since the last payment made by the receiver, the mortgagee claimed to have a sale of all the estates included in the original mortgage in order to cover arrears of interest. It was held by the House of Lords, affirming the judgment of the Court of Appeal, that the payment by the receiver out of the rents of the Limerick estate, was a payment which in law must be considered as made by the mortgagor in respect to the mortgage debt, and therefore prevented the Statute of Limitations operating as a bar to the demand as to any of the estates included in the mortgage. Lord Cranworth says, p. 138: "It was argued that a payment to be brought within this statute must be a payment by the mortgagor, not by a receiver who is an officer of the Court. But for this argument there is no warrant. The statute says nothing as to the person by whom the payment is to be made."

But, while it was held in *Cockburn v. Edwards* that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest would not by itself prove that there was no interest in arrear if no appropriation was shewn to have been made, yet the answer to this, so far as the present case is concerned, is found in what follows in the same case, for (18 Ch. D. at pp. 458, 459) the Master of the Rolls says: "Rents received by a mortgagee may by agreement be appropriated, and though, if no account is sent in, the mortgagee may wait to the end before making any appropriation, yet, if he settles an account in the meantime, he is bound by that account; and it is argued that here there was a settlement by which the interest was treated as paid up to a certain time. I think this argument well founded. The accounts rendered by the mortgagee appear to proceed on the footing that the rents were to be set off against interest, and the

Clute, J.

1917

STARK

v.

SOMERVILLE.

Clute, J.
1917
STARK
v.
SOMERVILLE.

final account treats the interest as having . . . been satisfied," down to a certain date, "and if the same arrangement was carried on, which the mortgagor, in the absence of any notice to the contrary, had a right to assume that it would be, no interest was three months in arrear when the sale took place . . . I think that the accounts furnish evidence that there was such an agreement, and that the rents were set off against the interest. I think, therefore, looking at the whole of the circumstances, that it must be considered that at the time of the sale there was not any interest in arrear for three months."

I think there was a clear understanding, acted upon throughout, that the proceeds from the sale of the stocks and from dividends paid should be credited as received upon the general balances; that it was so paid; that the defendant had knowledge from time to time that it was so paid, without objection; so that what took place amounted to an affirmation from time to time of what I find was the original agreement, and a new starting-point was given to the statute. See also Dos Passos, 2nd ed., p. 236; Addison on Contracts, 9th ed., p. 188.

The plaintiffs are entitled to judgment for \$3,708.30, with interest thereon at 5 per cent. from the 2nd May, 1913, with costs.

[The above decision was affirmed by the Second Divisional Court of the Appellate Division on the 11th January, 1918. See 13 O.W.N. 353. The reasons for the decision of the Divisional Court will be reported in due course.]

[APPELLATE DIVISION.]

1917

Oct. 12.

OTTO V. ROGER AND KELLY.

Ditches and Watercourses Act—Award of Township Engineer—Objections of Land-owner—Proceedings Initiated by another Owner—Next Step Taken by Owner's Wife—R.S.O. 1914, ch. 260, sec. 13—Personal Attendance of Engineer—Sec. 16—Drain Crossing Lines of Dominion Railway—Approval of Board of Railway Commissioners not Obtained—Insufficient Outlet—Sec. 6—Action to Restrain Engineer and Contractor from Proceeding under Award—Remedy by Appeal to County Court Judge—Effect of secs. 21, 22, 23—Curative Provisions.

Certain objections to an award, made by a township engineer, under the provisions of the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, were held to come within the provisions of secs. 21, 22, and 23 of the Act, as relating to matters which should have been dealt with by the County Court Judge upon an appeal under sec. 21; and, there having been no such appeal, the award was held to be valid and binding, under sec. 23. Anything that can be remedied by an appeal is covered by the curative clause, sec. 23.

Township of McKillop v. Township of Logan (1899), 29 S.C.R. 702, distinguished.

McGillivray v. Township of Lochiel (1904), 8 O.L.R. 446, explained.

Judgment of SUTHERLAND, J., 39 O.L.R. 127, affirmed. ✓

AN appeal by the plaintiff from the judgment of SUTHERLAND, J., 39 O.L.R. 127.

September 24. The appeal was heard by MEREDITH, C.J.C.P., MIDDLETON, LENNOX, and ROSE, JJ.

R. S. Robertson, for the appellant. There was really no award. The engineer did not make the inspection or examination of the ground required by the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, sec. 16. Instead, he sent an assistant, who only took some levels and refused to make the examination. [MEREDITH, C.J.C.P.:—Is it not just an imperfect award?] Until the meeting between the engineer and the parties called for by the Act has been held, and it has been determined whether or not the ditch is necessary, there is no jurisdiction to make an award: *Turtle v. Township of Euphemia* (1900), 31 O.R. 404. In the present case there was really no hearing, and the award is a nullity: *In re Robertson and Township of North Easthope* (1888), 15 O.R. 423; *Township of Elizabethtown v. Township of Augusta* (1901), 2 O.L.R. 4, at p. 17. This neglect to hear the parties was not merely a defect in the proceedings, which might be cured by sec. 23 of the Act, but was a fundamental error which rendered the proceedings void: *Township of McKillop v. Town-*

App. Div.
1917
OTTO
v.
ROGER
AND
KELLY.

ship of Logan (1899), 29 S.C.R. 702; *York v. Township of Osgoode* (1893), 24 O.R. 12; *Healy v. Ross* (1915), 33 O.L.R. 368, 22 D.L.R. 408. Another fundamental objection is, that L. Kumpf instituted the proceedings, but he was not the person who called in the engineer, as required by sec. 13 of the Act. The drain was not carried to a sufficient outlet (sec. 6), and so the award is illegal: *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446. Lastly, the award assumes to affect the Grand Trunk Railway Company. But that company is not bound by it at all, as the consent of the Board of Railway Commissioners had not been obtained, as required by sec. 251 (4) of the Dominion Railway Act, R.S.C. 1906, ch. 37. An award that does not bind is not an award at all: *McCrimmon v. Township of Yarmouth* (1900), 27 A.R. 636.

G. G. McPherson, K.C., for the defendant Roger, respondent. As to the Grand Trunk Railway, the consent of the Railway Board is not a condition precedent to the making of the award, but only to the doing of the work on the railway company's land. As to the Kumpf matter, the engineer was called in by Margaret Kumpf as owner. She is the wife of L. Kumpf. There was a sufficient outlet, and the *McGillivray* case does not apply. As to the engineer not being personally at the meeting, it was not necessary that he should have been there, as he testifies that in 1906 he had gone over the whole situation and taken levels, and so was thoroughly familiar with the locality. Section 23 of the Act, as it now stands, covers all such defects as this, and, read with sec. 21, simplifies the procedure by letting the County Court Judge decide such matters. The award, though defective, is still an award. The plaintiff does not deserve much consideration, on account of his laches in instituting his proceedings.

W. G. Owens, for the defendant Kelly, respondent. Kelly was the contractor for some of the drainage work. Although the plaintiff made some protest about Kelly doing the work on his land, he nevertheless allowed him to proceed until Kelly started to turn north, and it was only then that Otto began his proceedings. The plaintiff is confined to his remedy of appeal to the County Court Judge from the award, as provided by the Act: *St. Pancras Vestry v. Batterbury* (1857), 2 C.B.N.S. 477; *Hislop v. City of Stratford* (1917), 38 O.L.R. 470, 34 D.L.R. 31; *Foster v. Township of St. Joseph* (1917), 39 O.L.R. 114, 525.

Robertson, in reply. The plaintiff was not guilty of laches. He objected to the intrusion on his land from the beginning. The drain, however, was not doing him any harm until the excavators started to turn north. As it is, the drain will flood 28 acres of his land.

App. Div.

1917

OTTO
v.ROGER
AND
KELLY.

October 12. MEREDITH, C.J.C.P.:—This is another of those cases in which the consequences which must follow from giving effect to the plaintiff's claim are so unreasonable that it is hardly believable that the law can require that effect be given to it.

The purpose of the action is really to defeat a drainage scheme which has been carried so near to a completed drain that only a part of that part of it which was to have been constructed on the plaintiff's land remains unfinished. All of his neighbours through whose lands the drain passes, and whose lands are affected by it, have done all that the scheme required them to do, including the construction of the drain on two out of three parts of it on the plaintiff's land.

The scheme is one which is being carried into effect under the provisions of the Ditches and Watercourses Act, and an award purporting to have been made in accordance with them; and it is admitted that the proceedings in which the award was made were properly instituted: and the plaintiff was a party to such proceedings, but did not appeal against the award.

In these circumstances this action was brought to prevent the completion of the drain under the award, and so render nugatory the award and all that has been done under it, and so brought and carried on hitherto without any one of the other land-owners, or any other person beneficially interested in it, being made a party to the action; and we are asked to make a judgment behind the backs of all such persons, a judgment which will have that effect.

No one can doubt the right of any land-owner to sue any one for trespass to lands; but where the real question to be determined in the action is, whether an award made or purporting to be made under that drainage legislation is or is not valid, and when the plaintiff in the action was a party to the proceedings in which the award was made, one naturally turns to the enactment to see if it does not prevent so great an injustice as it would be to

App. Div.

1917

OTTO

v.

ROGER

AND

KELLY.

Meredith,
C.J.C.P.

give effect to the claim in this action in the absence of every one, affected by the award, except the plaintiff.

And one has not to go far or seek deeply to find that it does, whilst at the same time giving ample protection to all the rights of any one opposed to the award.

The Act—sec. 21—gives to any owner affected by the award a right of appeal to a Judge of the County Court of the county in which the land affected is; and confers upon such Judge the amplest power, after notice to all parties interested, to hear and determine the appeal, including the right to inspect the land and require the engineer to accompany him, and to set aside, “alter or affirm the award and correct any errors therein,” as well as order payment of costs and deprive the engineer of his fees, as therein provided.

Thus the Legislature has provided a special court with ample special machinery, in the locality, to hear and determine, speedily and inexpensively, and finally and fully dispose of, all such questions as those involved in this action: and it has done more than that; it has provided also—sec. 23—that an award shall, after the time for appealing has passed without appeal, as well as after the determination of appeals, if any, and affirmance of the award, “be valid and binding, to all intents and purposes, notwithstanding any defect in form or substance either in the award or in any of the proceedings prior to the making of the award:” and further—sec. 22—that “no award shall be set aside for want of form only or for want of strict compliance with the provisions of this Act, and the Judge, instead of setting aside the award, may amend it or the other proceedings or may refer back the award to the engineer, with such directions as the Judge may deem necessary.”

These and the other provisions of the enactment seem to me to make it abundantly plain that the Legislature intended that all such questions as have been presented for our consideration are questions which are to be dealt with in the special tribunal which it created for the purpose of best giving effect to the provisions of the Act, to be dealt with by that tribunal, with all its power to protect all persons and properties affected and prevent nugatory proceedings, after notice to “all parties interested;” and not in this or any other Court behind the backs of all parties substantially interested.

I cannot at all agree with Mr. Robertson, in his contention that the objections to the award are in respect of matters of such importance that, whether the County Court Judge had or had not power to deal with them, they should be held, in this Court, to have made the award altogether of no effect.

His first point is that, though the proceedings were commenced in the name of the husband, the next step was taken in the name of the wife, and that therefore the second step was not made in compliance with the provisions of sec. 13 of the Act. But, as the presumption is in favour of a proper rather than an improper course of procedure, the plaintiff should, in any case, have given further evidence than merely that which the notices afford, if they afford any, of non-compliance with the provisions of sec. 13. The notices were in respect of the same land, and it is very probable that the notice was given by the husband for his wife, and probable too that each has an interest in the land; and pretty certain that each notice was really the act of each. No one can be in any degree prejudiced by the notice, whether in conformity with the provisions of the 13th section or not. As the owner of the land is now bound by the award, the non-conformity, if there were such, becomes but a "want of form," a "want of strict compliance with the provisions of the Act;" as well as a thing amendable by the County Court Judge, and a defect in form or substance in some of the proceedings prior to the award, and so the Legislature expressly has quadruply guarded against our interference on such ground.

The second and main point is: that the engineer did not comply with the provisions of sec. 16, but sent his assistant to do the work. He should have complied substantially; but, if he had, the result would have been the same. He knew the place in question well; it was a foregone conclusion what his award would be; and so it seems to me to have been one of those wants or defects which the Legislature has wisely provided shall not, after the award has been affirmed, by lapse of time or otherwise, support an attack upon it.

So too, I think, of the point made, but based upon an assertion not really proved, that the approval of the Board of Railway Commissioners has not been obtained: and of the point, which I cannot find to be proved, that the drain was not continued to a

App. Div.
1917
—
OTTO
v.
ROGER
AND
KELLY.
—
Meredith,
C.J.C.P.

App. Div.
1917
OTTO
v.
ROGER
AND
KELLY.
—
Meredith,
C.J.C.P.

sufficient outlet. These things and the others are all things which the Legislature intended to have dealt with exclusively by the local Judge in the locality, and which it also intended that he should cure in all cases needing a cure and which were curable. Indeed it seems to me that that must be so, for look what must follow if we gave effect to the plaintiff's claim: the gross injustice of rendering nugatory and useless the award and the work done under it behind the back of every one directly interested in supporting the award: a thwarting the intention of the legislation to make the objects of the enactment obtainable speedily and inexpensively: a practical destruction of the award and waste of all former proceedings, only to have them gone over again with precisely the same result, as would surely be done at the instance of the same land-owner.

In regard to the outlet, if insufficient, the plaintiff's failure to appeal does not make him subject to irreparable injury, as was contended: the provisions of the drainage enactment are as much open to him as to any one else; and there is no reason to think that the drain of the municipality shall not be cleaned out, nor that, if it is not, there are no means of enforcing the performance of that necessary work.

The cases relied upon by Mr. Robertson are as likely to be misleading as helpful, having all been decided before the Act assumed its present form. We must deal with the Act as it is.

In my opinion, the trial Judge was quite right in dismissing this action, and we should likewise dismiss this appeal.

MIDDLETON, J.:—In this case the plaintiff must fail unless he can successfully attack the award made by the engineer.

Several grounds of attack were developed: the most important was, that the engineer did not, as directed by the statute, go upon the ground and meet the parties before making his award, but sent his assistant, and that this assistant was merely instructed to ascertain certain levels, etc., and did not hear the parties or their evidence, so that there was not only no hearing by the engineer himself but no hearing at all.

This, if made out upon the evidence, would be a most serious defect; and, if it is not sufficient to relieve from the award by reason of the curative provisions of the statute, minor objections need not be discussed.

When *Township of McKillop v. Township of Logan*, 29 S.C.R. 702, was decided, the statute (Ditches and Watercourses Act, 1894, 57 Vict. ch. 55, sec. 24) made an award binding "notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act." This was held not to cure an insufficient notice originating the proceedings, the section "not covering the proceedings to be taken anterior to it" (the award) "for the purpose of putting in operation the machinery of the Act" (p. 705).

The statute was amended after this decision; and, according to the amended statute, the award, after the time limited for appealing, and after the determination of any appeal, is "valid and binding, to all intents and purposes, notwithstanding any defect in form or substance either in the award or in any of the proceedings prior to the making of the award:" R.S.O. 1914, ch. 260, sec. 23.

It is argued that the omission on the part of the engineer to hear the parties is not "a defect in any of the proceedings" so cured, but is the failure to take one of the proceedings necessary to confer upon the engineer jurisdiction to make the award. The absence of the hearing, it is argued, is so fundamental a matter that, notwithstanding sec. 23, it renders the proceedings void.

This is, I think, too narrow a view of the statute. Its scope can best be grasped from a consideration of the power of the County Court Judge upon an appeal under sec. 21. The "appeal" is really a rehearing. The Judge may go into the whole matter *de novo*. He may go upon the ground and himself view the land. He may compel the engineer to accompany him and render all assistance. He may take evidence and may amend the award if this is necessary to do justice. If the engineer has been at fault he may be deprived of his fee.

This makes it clear that any neglect or improper conduct on the part of the engineer may be set right upon the appeal.

Anything that can be remedied upon the appeal is, in my view, covered by the curative section. The same validity is given to an award against which there is no appeal within the limited time as is given to an award which is dealt with upon an appeal.

App. Div.
1917

OTTO

v.
ROGER
AND
KELLY.

Middleton, J.

App. Div.
1917

OTTO
v.

ROGER
AND
KELLY.

—
Middleton, J.

The serious consequences which would follow from any uncertainty as to the validity of an award have induced the Legislature to give this wide right of rehearing before the County Court Judge, coupled with the statutory validation of all awards not attacked or attacked unsuccessfully.

Money is spent and work done on the faith of the award, and a serious situation would be created if this award should be treated as a nullity, and so an almost completed undertaking should be rendered useless, or the plaintiff escape paying his share, because of some bungle of an engineer.

If the alleged invalidity should be tried, as is here sought, in an action to which those interested in upholding the award are not parties, the inconvenience of yielding to the plaintiff's contentions becomes yet more apparent.

It is argued that the award is bad because the drain is not carried to a sufficient outlet. This is based upon a curious misreading of *McGillivray v. Township of Lochiel*, 8 O.L.R. 446. It was there held that an award could not justify pouring the drainage water upon the lands of a stranger to the proceedings. The Drainage Act contemplated taking the waters to a sufficient outlet and not pouring them upon the land of some one else. This was all that was there decided. In *Healy v. Ross* (1914), 32 O.L.R. 184, I so interpreted this decision, and on appeal (33 O.L.R. 368, 22 D.L.R. 408) Mr. Justice Garrow did not indicate that I had failed rightly to interpret his opinion in the earlier case.

Then it is said that the award is bad because it contemplates crossing the Grand Trunk Railway, and no permission has been obtained from the Dominion Railway Board. All that sec. 251 of the Railway Act requires is, that the consent of the Board be obtained before the work is actually done on the lands of the railway.

In all aspects of the case, the appeal fails, and must be dismissed with costs.

LENNOX, J., agreed in the result.

ROSE, J., agreed with MIDDLETON, J.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1917

Oct. 12.

RE MITCHELL AND FRASER.

Landlord and Tenant—Landlord and Tenant Act, Part III.—Overholding Tenants—Summary Ejectment—Powers of County Court Judge—Mortgagee and Mortgagor—“Person Entitled to Possession”—“Occupant”—Sec. 2 (b) and (d) of Act—“May”—Interpretation Act, sec. 29 (s).

“The person giving or permitting the occupation of the premises” or “the person entitled to possession of the premises,” included in the definition of “landlord” in sec. 2 (b) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, as applied to proceedings under the “Overholding Tenants” provisions of the Act (Part III., secs. 75 *et seq.*), must be some one of the character of a “landlord,” and the “occupant” (sec. 2 (d)) must be some one of the character of a tenant.

A County Court Judge has no power, under Part III. of the Act, to make a summary order for the issue of a writ of possession, at the instance of one whose only claim to possession is as one of several mortgagees, against the mortgagor in possession.

Per MEREDITH, C.J.C.P.—The governing word in secs. 75 *et seq.* is “may” not “shall;” by sec. 29 (s) of the Interpretation Act, R.S.O. 1914, ch. 1, “may” is to be construed as permissive; and so, even in regard to cases within the legislation, the powers conferred upon County Court Judges should not be exercised where for any good reason the case ought not to be summarily determined, but tried in the ordinary way. ✓

APPEAL by Donald Fraser, called in the proceedings the “tenant,” from an order of a Judge of the County Court of the County of Carleton, under Part III. (“Overholding Tenants”) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155,* directing the

*Section 75 of the Act provides: “(1) Where a tenant after his lease or right of occupation, whether created by writing or by parol, has expired or been determined, either by the landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses or neglects to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord may apply upon affidavit to the Judge of the County or District Court of the county or district in which the land lies to make the inquiry hereinafter provided for.

“(2) The Judge shall in writing appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired or been determined by a notice to quit or for default in payment of rent or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant, having no right to continue in possession, wrongfully refuses to go out of possession. . . .”

Section 76: “The proceedings under this Part shall be intituled in the County or District Court of the county or district in which the land lies, and shall be styled: ‘In the matter of (giving the name of the party complaining), Landlord, against (giving the name of the party complained against), Tenant.’”

Section 77: “(1) If, at the time and place appointed, the tenant fails to appear, the Judge, if it appears to him that the tenant wrongly holds against the right of the landlord, may order a writ of possession, Form 3, directed to the

App. Div.
1917
—
RE
MITCHELL
AND
FRASER.

issue of a writ of possession to put Mitchell, called the "landlord," in possession of the premises of which Fraser was in possession.

September 24. The appeal was heard by MEREDITH, C.J.C.P., MIDDLETON, LENNOX, and ROSE, JJ.

J. E. Jones, for the appellant, argued that the Landlord and Tenant Act did not apply, as the relation of landlord and tenant did not exist here. See R.S.O. 1914, ch. 155, sec. 2; *In re Reeve* (1867), 4 P.R. 27; *Sweeney v. DeGrace* (1913), 42 N.B.R. 344; *Re Dickson Co. of Peterborough and Graham* (1912), 27 O.L.R. 239.

H. M. Mowat, K.C., for the respondent, contended that the County Court Judge was right in his conclusions. The "landlord" was the person entitled to possession of the land: *In re Lumbers and Howard* (1905), 9 O.L.R. 680.

Jones, in reply.

October 12. MEREDITH, C.J.C.P.:—In this case the respondent has, in summary proceedings, before a Judge of the County Court, under legislation respecting "overholding tenants," obtained an order for a writ of possession of the land in question, although the only relationship between him and the appellant is that of one of several mortgagees and the mortgagor; and this appeal is made against that order, on the ground that that Judge had no power to make it, because the case is not one which comes within such legislation.

And that that is so it seems to me to be needful to do no more than to point to the necessary effect of the decision of the learned

sheriff of the county or district in which the land lies, to be issued commanding him forthwith to place the landlord in possession of the land.

"(2) If the tenant appears, the Judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and if it appears to the Judge that the tenant wrongfully holds against the right of the landlord, he may order the issue of the writ."

Section 78: "(1) An appeal shall lie to a Divisional Court from the order of the Judge granting or refusing a writ of possession, and the provisions of the County Courts Act as to appeals shall apply to such an appeal.

"(2) If the Divisional Court is of opinion that the right to possession should not be determined in a proceeding under this Part, the Court may discharge the order of the Judge, and the landlord may in that case proceed by action for the recovery of possession."

By the interpretation section of the Act, sec. 2 (b), "'Landlord' shall mean and include lessor, owner, the person giving or permitting the occupation of the premises in question and his and their heirs and assigns and legal representatives, and in Parts II. and III. shall also include the person entitled to the possession of the premises."

By sec. 2 (d): "'Tenant' shall mean and include lessee, occupant, subtenant, under-tenant, and his or their assigns and legal representatives."

Judge to make very plain. If it be right, then the legislation, though always labelled "overholding tenants" legislation, really has no more to do with the relationship of landlord and tenant than it has with any other kind of possession; any one can take advantage of its provisions instead of bringing an action for the recovery of land; and it has remained until this day to be discovered that such is the law.

"The person entitled to possession of the premises," in proceedings under the enactment respecting "overholding tenants," must be some one of the character of a "landlord," and the "occupant" must be some one of the character of a "tenant;" the word "person" cannot mean—for instance—a person claiming possession under a paper title against a person claiming title by length of possession; nor can the word "occupant" include the latter person. And it may be added that even the form in which the statute requires the proceedings to be taken, is: "In the matter of _____, Landlord, against _____, Tenant."

No kind of such relationship exists between the parties to these proceedings. That is admitted. The regular, proper, and common course of proceeding in a case of mortgagor and mortgagee is to sue for foreclosure or redemption—see Rules 460 and 33 (*h*)—and, if immediate possession be sought, it can be had in a proper case: see Forms 4 (*a*) and (*b*), and Rules 460, 33, 56, 57, and 62. The higher Court has full power to deal with such cases in all their aspects, which obviously cannot be the case in such proceedings as those in question.

The enactment in question was not intended to be a means of unfairly depriving any person of trial by jury, or of any of the ordinary methods of trial, and the ordinary rights of appeal after such a trial. The governing word, even in regard to cases within the legislation, is "may" not "shall," and "'may' shall be construed as permissive;" Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*s*); and, so, the powers conferred upon County Court Judges by this legislation should be exercised in proper cases, but should not be exercised in a case which for any good reason ought not to be so tried, but should be tried in the ordinary way. In this case other mortgagees and persons are concerned in the disposition of the mortgaged premises. But, as I have said, this case is clearly, in my opinion, not one within such legislation.

App. Div.
1917

RE
MITCHELL
AND
FRASER.

Meredith,
C.J.C.P.

App. Div.

1917

RE

MITCHELL

AND

FRASER.

Middleton, J.

And, so, I would allow the appeal and discharge the order appealed against.

MIDDLETON, J.:—This order cannot be supported unless Part III. of the Act respecting Landlord and Tenant can be so interpreted as to enable any person wrongfully in possession of land to be summarily ejected, at the instance of the owner, as an “overholding tenant.”

The only foundation for this argument is the definition of “landlord” as including “the person giving or permitting the occupation of the premises;” and “the person entitled to the possession of the premises;” and of “tenant” as meaning and including “occupant.”

These definitions, in substantially the same words, have been in the statute from 1868, but it has never been suggested that the Act applied to any case in which the parties did not occupy substantially the position of landlord and tenant.

The definition of these terms in wide and somewhat vague language was, no doubt, intended to preclude any over-refinement by which the usefulness of the Act would be destroyed.

The true meaning of the Act can well be gathered from sec. 75 itself. There must be a lease or “right of occupation” which has “expired or been determined” by any mode whereby “a tenancy or right of occupancy” may be put an end to. Then, if the tenant refuses or neglects to go out of possession of the land “demised to him, or which he has been permitted to occupy,” summary proceedings may be taken. In order that a case may be brought within the Act, there must be either a demise or an agreement under which the tenant is “permitted to occupy” the land, and this permission must be one which will either determine by the expiry of the term for which it was granted or be determined by a notice pursuant to a term of the agreement or by some “other act whereby a tenancy or right of occupancy may be determined.”

It is enough to say that the right of a mortgagor to remain in possession of the mortgaged premises is not, in my view, a “right of occupancy” within this statute. Mortgages sometimes contain a clause by which the mortgagor attorns to and becomes tenant of the mortgagee. There is no such clause here.

The mortgagor covenants (statutory covenant No. 7) that on

default the mortgagee may enter upon the lands. This gives the mortgagee a right of entry; and covenant No. 17 gives the mortgagor a right to remain in possession until default; but all this is found in the instrument under which the mortgagee acquires his title. The right of occupancy which the Landlord and Tenant Act refers to is, in my view, a right given by one who is already the owner of the land, under which the tenant obtains possession. It is a right which may terminate or be determined, and the landlord will then enter under his original title. It is not a contract or agreement under which another is to be for the first time let into possession.

A purchaser of land who has paid his price has a right of occupation, but he cannot obtain specific performance under the Act in question.

The appeal should be allowed and the motion should be dismissed, both with costs.

ROSE, J., agreed with MIDDLETON, J.

LENNOX, J., agreed in the result.

Appeal allowed.

[APPELLATE DIVISION.]

HILL v. TORONTO R.W. Co.

App. Div.
1917

RE
MITCHELL
AND
FRASER.

Middleton, J

1917

Oct. 12.

Street Railway—Injury to Person Attempting to Enter Moving Car—"Invitation"—Sudden Increase of Speed—Negligence—Contributory Negligence—Evidence—Findings of Jury.

The plaintiff, a workingman, elderly but active, was crossing from the north side of a street to the south with the intention of becoming a passenger upon an east-bound car of the defendants, which had reached a stopping place and was standing still, and which he could not enter except by the rear-door on the south side. The car began to move when he was about half-way across the street, but the motorman motioned him to go in front of the car, and stopped it; the plaintiff passed in front of the car and proceeded to the rear-end of it; before he reached that end, the car had (without any signal from the conductor) begun to move slowly; the plaintiff attempted to step on; but, as he did so, the car gave "a sudden jolt forward," he failed to get on the step of the platform, fell, and was injured. At the trial of an action for damages for his injuries, there was no conflict of testimony; and the jury found: (1) that the plaintiff was invited by the motorman to get on the car when it was in motion; (2) that the danger of getting on the car when in motion was not so obvious that a reasonable man would not have accepted the invitation; (3) that the plaintiff's injuries were caused by the negligence of the defendants; (4) in "not seeing the passenger on safely on the car;" (5) no contributory negligence:—

1917

HILL

v.

TORONTO
R.W. Co.

Held (RIDDELL, J., *dubitante*), that the findings were such as reasonable men might make upon the evidence; and a judgment for the plaintiff was affirmed.

Per MEREDITH, C.J.C.P.:—The conclusion that reasonable men could find that the car was stopped to take up the plaintiff being reached, the finding must be for the plaintiff on the question of the defendants' negligence; because it was negligent to put the car in motion again until the motorman was signalled by the conductor to do so.

Proof of the fact that a person attempts to board or alight from a street-car in motion is not necessarily proof of contributory negligence. The question is, whether, in all the circumstances of the case, the attempt shews a want of that care which is ordinarily taken in the like circumstances. It must always be a question of circumstances, and generally a question for the jury. A standing car is not necessarily an invitation to enter, if an invitation be needed; neither is a slowly moving car a revocation of an invitation—if there were any—so long as the door is open and no attempt is made to prevent boarding or alighting.

The word "invitation" is inappropriate and often misused. The defendants are carriers for hire, obliged to carry, not those they invite, but every one willing to pay the fare.

Per LENNOX, J.:—There was evidence upon which the jury could reasonably reach their conclusions, and the judgment based on their findings could not properly be disturbed.

Per ROSE, J.:—If any invitation was to be found, it was to be found from all the acts sworn to—the stopping, the motion made by the motorman, and the starting slowly forward; and the jury might treat these acts as constituting an invitation to enter the car when it was in motion.

It was said that, whatever might be thought about the plaintiff trying to enter a slowly moving car, he ought to have desisted as soon as he found the speed increased. But, on the evidence, the plaintiff was confronted with a sudden emergency, and it was open to the jury to find that his perseverance in his attempt to enter the car was the result of an error of judgment, in that emergency, which ought not to be called negligent.

✓ AN appeal by the defendants from the judgment of DENTON, Jun. Co.C.J., in an action in the County Court of the County of York, in favour of the plaintiff, upon the findings of a jury, for the recovery of \$388.50 damages, with costs.

The plaintiff complained of personal injuries sustained, by reason of the negligence of the defendants' servants, when he was attempting to get upon one of their street-cars as a passenger.

The questions left to the jury and their answers were as follows:—

(1) Was the plaintiff invited by the motorman to get on the car when it was in motion? A. Yes.

(2) If so, was the danger of getting on the car when in motion so obvious that a reasonable man would not have accepted the invitation? A. No.

(3) Were the plaintiff's injuries caused by the negligence of the defendants? A. Yes.

(4) If so, in what did their negligence consist? A. Not seeing the passenger on safely on the car.

(5) Was the plaintiff guilty of any negligence that contributed to the accident? A. No.

(6) If so, in what did his negligence consist?

(7) At what sum do you assess the damages? A. \$388.50.

1917

HILL

v.

TORONTO
R.W. Co.

September 25. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. W. Bain, K.C., for the appellants, argued that there had been no invitation by the motorman to the plaintiff to get on the car, and that there had been no negligence by the defendants proved. The plaintiff, in any event, was negligent in trying to enter the car after the speed was increased.

S. Rogers, for the plaintiff, respondent, contended that it was open to the jury to find that there had been an invitation to the plaintiff by the motorman: *McGill v. Montreal Tramways Co.* (1916), Q.R. 49 S.C. 326. The jury had also found negligence by the defendants, and their findings could not be lightly disturbed: *Curry v. Canadian Pacific R.W. Co.* (1889), 17 O.R. 65.

Bain, in reply.

October 12. MEREDITH, C.J.C.P.:—This is an appeal in a County Court case, in which the plaintiff has recovered judgment against the defendants, and \$388.50 damages, for injuries sustained by him in being thrown upon the pavement when endeavouring to board one of the defendants' cars.

The injuries sustained were serious; and the damages awarded were moderate, being the amount which the plaintiff was out of pocket through the accident, and his wages for the time during which he was incapacitated by the injuries he sustained.

The case was tried, with much care and deliberation, by a Toronto jury, before a Judge of much experience in the trial of such actions: all the points relied upon by the defendants here were urged at the trial, just as fully as here, and, after twice taking time to consider them—once over-night during the trial and again after the verdict—the trial Judge overruled them; and the jury found unmistakably in the plaintiff's favour.

The jury evidently considered the case with much care, coming back into Court, after they had been charged and had retired, to get further information on a question of much importance as to the evidence: and, being a Toronto jury, could hardly

App. Div.
1917

HILL
v.

TORONTO
R.W. Co.

Meredith,
C.J.C.P.

have been without considerable knowledge of street railway methods and considerable experience in boarding and alighting from the defendants' cars; much more, doubtless, than any of the Judges of this Court is likely to have had or to have.

In these circumstances, we are asked, in a case of moderate damages such as have been awarded to the plaintiff, to determine that the twelve jurors who gave the verdict, did that which reasonable men could not have done: and that the experienced trial Judge, who in effect twice ruled that that which they had done reasonable men might do, was wrong. With jurors of such experience, plainly trying to do their duty according to the oath they had taken, and with a Judge of such experience, having so found and so ruled, it does seem to me that it should require unbounded confidence in my own judgment if I were to declare them all to have been wrong, and, more than that, that the jurors were so stupidly wrong that reasonable men could not have done as they did.

On the contrary, I am quite satisfied that they were right; and, no matter what may be said to the contrary, have no hesitation in taking my place with them in supporting the plaintiff's claim, for the reasons some of which I shall now state.

There is no conflict of testimony: the defendants did not attempt to controvert in evidence anything that was testified to by the plaintiff: they called no witness.

Upon the plaintiff's evidence, not only might reasonable men find that the car in question stopped to take him up as a passenger, but they could not very well find otherwise. It was a Saturday afternoon, at the hour when the plaintiff and his fellow-workmen always left their work, near the place where the accident happened, and hurried home, taking the street-cars to carry them there; and this was well-known to the defendants' "motormen" and "conductors" upon that route. The plaintiff was a few moments too late to catch the car in question before it started from the usual stopping place: he was walking diagonally across the road towards it, and was apparently only about 35 yards away from it, when it was started: facing it, he stopped in the middle of the other track as the car approached, that is, he was half the width of the track he was on, and the width of the "devil-strip," clear of the track upon which the car was then slowly moving towards

him. What happened is very obvious: the motorman, seeing him and knowing the man's desire to get home as quickly as possible—with, no doubt, a fellow-feeling—stopped to take him on: an easy thing to do, as the car must have been going slowly, having traversed so short a distance from the place where it had stopped to take up and let down passengers. Having stopped, with the head of the car beyond the place where the plaintiff was standing, the motorman naturally made the motion with his head which indicated to the plaintiff that he should go around the front of the car—in short, that he would be taken upon it, even though a few seconds too late to catch the car at its usual stopping place.

In these circumstances, we can interfere with the verdict and judgment, on the question of the defendants' negligence, only if we find that, from these circumstances, no reasonable men could find that the car was stopped to pick the plaintiff up; and, if that be found by any one, I very much prefer to place myself among those unreasonable men, the jurors.

It is suggested that the car was stopped, in a sort of "*après vous*" fashion, to let the plaintiff cross the road in front of it. Do moving street-cars stop to let a pedestrian pass in front of them, when there is no danger of injuring him if they go on? Or do they sound a gong, warning him to keep out of danger if he might be thought to be going into danger? No gong was sounded. The car was going slowly. The motorman knew that this workingman was keenly anxious, on this Saturday afternoon, to board the car to go home. And then, that which makes the thing conclusive, the car had partly passed the plaintiff, who was standing in a place of perfect safety, and we are seriously asked, notwithstanding this, to find that it was stopped for the sole purpose of allowing the plaintiff to come from that place of safety around the front of the car and go on his way, not into the car but away from it: and not only to find that but solemnly to adjudge that no reasonable men, no matter how much greater their knowledge of and experience in these things than ours, could come to any other conclusion.

As I have said, once the conclusion is reached that really, after all, reasonable men could find that the car was stopped to take up the plaintiff, the finding, not only might be, but must be, for the plaintiff on the question of the defendants' negligence; because

App. Div.
1917

HILL
v.
TORONTO
R.W. Co.

Meredith,
C.J.C.P.

App. Div.
1917

HILL
v.

TORONTO
R.W. Co.

Meredith,
C.J.C.P.

it was negligent to put the car in motion again until the motorman was signalled by the conductor to do so, and there is no contention that any such signal was given. Passengers board such cars as that in question at the rear-door, and so motormen are not in a position to see to the safety of those getting on. That is the conductor's duty. When a car stops, passengers may attempt to get off and persons may attempt to get on, and so it is necessary that no movement be made until the conductor's signal to proceed is given. This does not apply merely to regular stopping places, it applies to every place where attempts to board or alight may be made.

I am entirely in agreement not only with the trial Judge but also with the jury upon this branch of the case; and I am also entirely with the trial Judge, and have no fault to find with the jury, upon the other branch of the case.

There was evidence upon which reasonable men might find, as this jury found, that the plaintiff was not guilty of contributory negligence.

Proof of the mere fact that a person attempts to board, or alight from, a street-car in motion, is not necessarily proof of contributory negligence. The question is: whether, in all the circumstances of the case, the attempt shews a want of ordinary care, a want of that care which is ordinarily taken in the like circumstances. It is dangerous, in a sense, of course: but so too is getting on or off a car not in motion; and the latter more dangerous to some than the former is to others—for instance, to the crippled and the blind and to those hampered with a heavy "suit-case" in each hand, or a "baby-carriage" in both, than the former to the active and unhampered. Tens of thousands of persons board and alight from vehicles in motion uninjured, it is a thing of the commonest and most frequent occurrence: and so it would be plainly erroneous to say that it is a want of ordinary care: it may or may not be, according to the circumstances; and so must be generally a question for the jury. If getting off or on a moving street-car might save life or win a fortune, no one could say but that failing to attempt it would be an insane want of ordinary care in an ordinary person. It must be always a question of circumstances; and generally a question for the jury.

In this case an able-bodied man—though of three score and

ten years—a pedestrian and a mechanic earning nearly \$4 a day, having had the car stopped to let him aboard, took the proper method of safely getting on board when the car was just starting again: a thing that, through the motorman's improper action, he was obliged to do or fail to get home by the car that had stopped to enable him to do so. Not one man in a thousand such as he, or indeed any of us, would have done anything but that which he did; would have stood idly by whilst the car which had stopped to take us on crawled slowly away. Nor in such a case was any accident likely to happen: in this case it happened, according to the evidence, entirely through the car giving "a sudden jolt forward" just as the plaintiff was stepping on: up to that time it had gone and was going slowly, "creeping along very slowly, as slow about as it was possible to go."

The case seems to me to be a very plain one: the motorman intended to take the plaintiff up, and stopped the car to enable him to come around to the side of it from which only he could get on board; and, having seen him there, not unnaturally, started the car slowly, knowing that the man, indeed any man of ordinary agility, could board it as well in that slow motion as standing still, and anxious not to lose more time; but unfortunately he put the power on for greater speed before the plaintiff was aboard, and so caused the accident: and so is blamable for it: because he put the car in motion without a signal to do so, and before the plaintiff, exercising ordinary diligence, was safely on board. And how can fault be found by the defendants with any person who reaches that conclusion, in the absence of any evidence from motorman or conductor, neither of whom was called by the defendants to testify in this case?

The word "invitation" has been used in this case, a word which I desire to say I consider quite inappropriate and often misused. The defendants are carriers for hire, obliged to carry, not those they invite, but every one willing to pay the fare. It might better be said that the "invitation" came from the plaintiff. His hurrying diagonally across the street to catch the car was rightly interpreted by the motorman as a request, an invitation if you will misuse the word, to take his fare and carry him.

It is useless for the defendants to say it is dangerous to board

App. Div.
1917

HILL
v.
TORONTO
R.W. Co.

Meredith,
C.J.C.P.

App. Div.
1917

HILL
v.

TORONTO
R.W. Co.

Meredith,
C.J.C.P.

a moving car, whilst they continue to permit that to be done, having no hesitation about accepting all the fares it brings them. If they really believe it to be dangerous, they can stop it by the simple and easy means of closing the doors, or a wicket, or bar, before the car is put in motion. If any one chooses to call the open door an "invitation," to close it is the obvious way to close the invitation. A standing car is not necessarily an invitation to enter, if an invitation were needed; neither is a slowly moving car a revocation of an invitation—if there were any—so long as the door is open and no attempt is made to prevent boarding or alighting.

I am in favour of dismissing this appeal; which, it seems to me, should not have been made.

RIDDELL, J.:—This is an appeal from the County Court of the County of York.

A repeated perusal of the evidence and a consideration of the law applicable to the facts have not wholly removed my doubts; but to doubt is to affirm.

As my learned brethren agree to dismiss the appeal, no good end would be attained by an extended discussion of the case.

LENNOX, J.:—Contrary to the tentative opinion I entertained when the appeal was argued, I think, after reading and carefully weighing what was deposed to at the trial, that there was evidence upon which the jury might quite reasonably answer the questions as they answered them: and that the answers afford a sufficient basis for the judgment entered up. The key to the whole situation is to be found in the plaintiff's answer to a question put to him by the learned trial Judge, after he had been re-cross-examined by Mr. White.

"The Court: This nod you spoke of was just a nod of the head, was it? A. It was a kind of side-motion as much as to say 'Come on.' He had stopped. The car was at a standstill then, and he just gave the motion with his head, and I walked around the head of the car: we had done the same thing repeatedly. Of course the motormen knew us all around there."

These facts, casually revealed, and having a significance evidently not appreciated by either the plaintiff or his counsel—

for, if referred to, they were not dwelt upon or emphasised on the argument—constitute an invaluable background of “surrounding circumstances” and afforded to the jury a reasonably safe and intelligible basis upon which to determine why the car was stopped, what the motorman meant and intended by the motion of his head, and other facts deposed to at the trial.

The plaintiff was bound to make out his case. He cannot fairly ask the jury to determine that the defendants were negligent if the evidence pointed just as strongly to the absence of negligence as it pointed the other way. Ground for surmise, or conjecture, or a choice between possibilities, is not enough. It is not enough to prove that “it might have been.” If the evidence as to the defendants’ negligence is “on the balance,” the answer on this issue should be, “no.”

The learned trial Judge, in a way quite fair to the defendant company, called attention to the possible discrepancy between the evidence of the plaintiff, as to the speed at which the car moved off, and the evidence of Henry Urquhart, at the time some 60 yards away. I do not discover any discrepancy. With the plaintiff—a rapid walker—going west from the front-door and the car moving east, very slowly at first, the car could not have travelled more than 4 or 5 feet before it jolted and got right under way as described by the plaintiff. Of course “it picked up speed,” or the injury would not have been occasioned. At all events it was a question for, and left fairly to, them. As to the whole case it was for the jury to believe the plaintiff or not according to their judgment; and, reading the evidence, and noting the exceptionally candid way in which he answered on points telling against himself, I would not find fault with them if they accepted every word of his evidence as true.

The question then is: was there evidence upon which the jury could reasonably find as they did? Without the evidence I have quoted I don’t think they could. The circumstances were capable of conflicting meanings, and nothing to point with reasonable certainty to the correct one. With this background of surrounding circumstances, and acting reasonably, how would they reason it out? They would be justified, in my opinion, in saying: “Here is a man seventy years old. Any one of us would know him again if we met him in King street to-morrow. He had been

App. Div.

1917

HILL

v.

TORONTO
R.W. Co.

Lennox, J.

App. Div.

1917

HILL

v.

TORONTO

R.W. Co.

Lennox, J.

going up and down this line and getting on and off at the same points, twice a day on every working day in the week, for five years. On Saturdays he went home earlier than on other days. Other workmen returning from the same shop got on at this same point and repeatedly in the same way. When the motorman saw the old man come along in a hurry, he knew just what he was after and stopped the car, and jerked his head, meaning, Get round and get on, and lose no time about it, and he lost no time. The motorman moved the car along slowly until he thought the old man was on, and then he let it go with a jerk and a jolt. He made a mistake of about a half a second, or not much more. He stopped to let him on, and with his head told him to get on, and the plaintiff acted on it, thinking it was safe. If this was not the way of it, why didn't he come and say so? And the conductor, too, could probably have told us why the car was stopped. Where was he? The Judge said the plaintiff did not swear that this motorman knew him, but that is surely what he meant. The company's lawyer perhaps thought so too, for he went after him again—this was the third time—but not on this point—at all events a motorman *would* know 'by sight' a man who was using the line twice a day, for the cars run according to a schedule, and each motorman has his regular runs—hours on and off each day, circling round according to some system. At least that seems to be the way of it, for if you go down to your work at a certain hour in the morning or back in the evening day after day you will see the same men again and again and you'll get to know their faces as you know the face of your own boy. There may be breaks, but the same men keep cropping up. A motorman running on that line would know the old man, and the old man would know him. Of course he might have been a new hand, but the company were mighty careful not to call him or the conductor either. Why? Their lawyer said he 'did not think it worth while to bother the jury.' Well!"

"They say the plaintiff brought it upon himself—was negligent. It does not seem that way. He depended upon the motorman, and accepted the accommodation offered by the company, as he and others had often done with safety at that point, and with a car 'just creeping along' there was no risk. He did what any sensible man might do. He could not see 'the jolt' coming,

and it was 'the sudden jolt forward' that did it. When the motorman told him to get on, and moved the car slowly forward, he intended him to get on a slowly moving car. They should have afforded him the means of getting on in safety, and the car should not have been jolted."

If there was evidence upon which the jury could reasonably reach the conclusions I have just set out, and I am firmly of opinion that there was, their findings and the judgment based on them cannot properly be disturbed. I have inferred that the jury would probably, in weighing the evidence, take note of the circumstances that witnesses, who probably could have been called, were not called: and I do not want to be misunderstood as to this. It is the undoubted privilege, and more it is the duty, of counsel for the defence to exercise his own judgment as to whether he will call witnesses or not, and a Judge trying the case alone would, I presume, endeavour not to allow it to influence his mind either way; but it is inevitable—and I express no opinion as to whether it is regrettable or not—that, if this unquestionable right is exercised, without some satisfactory explanation, the jury are liable to draw an inference unfavourable to the defendants. And in any case, whether with Judge or jury—though I am liable to misquote a sporting phrase—the counsel who can open his argument with the statement, "The evidence for my client is *wholly uncontradicted*," "gets off to a good start."

The appeal should be dismissed.

ROSE, J.:—The plaintiff was crossing Dupont street in a south-westerly direction, with the intention of boarding an east-bound car belonging to the defendants, which stopped at one of the regular stopping places. He swears that, while he was still north of the east-bound line of rails and east of the car, it started forward and he stopped; that the car stopped again when the front of the fender was a foot or two farther east than the place where he was standing and while he was still "in front of the vestibule;" that the motorman gave him "a kind of move with his head to come on"—on cross-examination he put it "motioned for me to come forward to go across in front of the car;" that he passed around the front of the car and turned, close to the fender, and went along the south side of the car towards the entrance, which

App. Div.
1917

HILL
v.

TORONTO
R.W. Co.

Lennox, J.

App. Div.
1917
HILL
v.
TORONTO
R.W. Co.
Rose, J.

is at the rear-end; that when he was opposite the front door the car "began to creep along very slowly, as slow about as it was possible to go," and that its speed was not increased at all up to the time when he came to the rear-step. It seems to me that upon this evidence it was open to the jury to find, as they have done, that there was an invitation by the motorman to the plaintiff to get on the car when it was in motion.

It was argued that from the facts proved the jury might just as well, perhaps better, have found that the motorman stopped the car in order to allow the plaintiff to cross the street in front of it, the "kind of move with his head to come on" which the motorman gave indicating merely that the plaintiff might safely cross the street, and not that he might enter the car. This argument seems to me to overlook two facts: the one, that when the car stopped the front of it had passed the plaintiff, who would have been able to cross behind the car in another second or two if the car had continued on its course; and the other that when the car started forward it "began to creep along very slowly," and did not increase its speed until it had gone nearly a car's length. It is true that a witness called by the plaintiff says that the car "was picking up its speed all the way;" but I am here dealing, not with what ought to be found to be the fact, but with the question whether there was evidence upon which the jury might find as they have done in answer to the first question submitted to them, and I point to this statement of the plaintiff's about the speed of the car as something that is to be borne in mind in that connection.

It was also argued that, if there was any invitation at all, it was an invitation to enter a car at rest, and that that invitation was revoked when the car was moved. This, again, seems to leave out of consideration the evidence as to the speed. I think that, if any invitation is to be found, it is to be found from all the acts sworn to—the stopping, the motion of the head, the starting slowly forward—and, as I have said, I think the jury might treat these acts as constituting an invitation to enter the car while it was in motion.

The plaintiff expressed his agreement with a statement by counsel for the defendants, that "it would be fair to assume, if it is not a fact, that it is dangerous to attempt to get on to a moving

car." As a general statement, this is, no doubt, correct; but whether it follows that it was negligent on the part of the plaintiff to attempt to enter the car in question, moving at the speed at which it was moving, was a question for the jury, and I do not see how their finding that the plaintiff was not guilty of negligence in so doing can be interfered with. There is an allegation of a further act of negligence on his part, which I shall deal with after discussing the finding of negligence on the part of the defendants.

The plaintiff says that when he reached the rear-end of the car he took hold of the upright bars, one with each hand, intending to step up on to the step, but just then the car gave a sudden jolt forward, which threw him off his balance so that he missed his step, "and never got to the step at all;" that, after an unsuccessful attempt by a passenger to help him on, he had to let go, and fell to the ground, sustaining the injuries of which he complains. The trial Judge, in leaving to the jury the questions whether the plaintiff's injuries were caused by the negligence of the defendants, and, if so, what constituted such negligence, said to them: "The act of negligence relied upon here is that, when he was in the act of stepping on the car, it suddenly started faster. The answer to that question involves, too, the question whether the motorman knew he was getting on the car. If the motorman merely nodded for him to go across and continue on his journey, the motorman had no reason to believe he was boarding the car at all; and, if that was so, there was surely no negligence in his starting the car up a little faster, even with a jerk. But, if the motorman knew or had reason to believe that the plaintiff was boarding the car, and, believing that, gave it a start and threw the plaintiff down, then that is a different matter. . . . There is only the one thing, the sudden starting of the car faster."

The jury found that the plaintiff's injuries were caused by the defendants' negligence and that such negligence consisted in "not seeing the passenger safely on the car." It seems to me that, read with the charge and with the other findings, this finding is not equivocal, but clearly means that the motorman was negligent in that, having invited the plaintiff to enter the moving car, and knowing or having the means of knowing that the plaintiff was acting upon the invitation, he gave the sudden "jerk" to the car without first ascertaining that the plaintiff had reached a

App. Div.
1917

HILL
v.
TORONTO
R.W. Co.
Rose, J.

App. Div.
1917

HILL
v.

TORONTO
R.W. Co.

Rose, J.

place of safety. Further, I think that the fact that there was an invitation being found against the defendants, and there being evidence that when the plaintiff passed around the front of the car he walked, not towards the side of the street, but towards the rear of the car, the jury were justified in finding that the motor-man ought to have known, if he did not in fact know, that the plaintiff was about to enter the car and that any sudden jolt was likely to cause injury to him.

Now for the further act of negligence charged against the plaintiff. It is said that, whatever is thought about his trying to enter a slowly-moving car, he ought to have desisted as soon as he found the speed increased. Perhaps that would have been the safer course; but, on the evidence, the plaintiff was confronted with a sudden emergency, and I think it was open to the jury to find that his perseverance in his attempt to enter the car was the result of an error of judgment, in such emergency, which ought not to be called negligent.

I would dismiss the appeal.

Appeal dismissed with costs.

1917

[APPELLATE DIVISION.]

May 31.
Oct. 12.

SIMPSON V. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Negligence—Local Board of Health—Medical Officer of Health—Death of Diphtheria Patient—Action under Fatal Accidents Act—Evidence—Findings of Jury—Absence of Causal Relation between Negligence and Death—Public Health Act, R.S.O. 1914, ch. 218, sec. 58—Effect of—Infectious Diseases—Public Safety—Duty of Health Authorities—Actionable Breach.

There being no evidence that the death of the plaintiffs' infant daughter, a diphtheria patient, was the result of the negligence of the defendants, the Local Board of Health and Medical Officer of Health of a city, the judgment of BRITTON, J., the trial Judge, dismissing the action, notwithstanding the finding of the jury that the death was caused by negligence of the defendants, was affirmed.

The child was apparently recovering from diphtheria when paralysis of the heart intervened and caused her death.

The causal relation between the alleged negligence and the death must be made out by evidence, and not left to the conjecture of the jury.

The main purpose of sec. 58 of the Public Health Act, R.S.O. 1914, ch. 218, is the protection of the public against the spread of contagious and infectious diseases; and *quære*, whether that enactment imposed upon the defendants a duty to the patient for a breach of which an action would lie.

ACTION under the Fatal Accidents Act, brought by the parents of Martha Simpson, a child of seven, to recover damages for her

444
410 RR 320

death by reason, as the plaintiffs alleged, of the negligence of the defendants, the Local Board of Health and the Medical Officer of Health of the City of Belleville.

The action was tried before BRITTON, J., and a jury, at Belleville. The findings of the jury are set out below.

1917
SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.

W. C. Mikel, K.C., for the plaintiffs.

S. Masson, K.C., for the defendants.

May 31. BRITTON, J.:—The plaintiffs are the parents of Martha Simpson, a girl of seven and a half years of age, who was taken sick on the 26th January, 1916, with a disease that proved to be diphtheria, from which she died on the 2nd February following.

When the Local Board of Health, or the Mayor of Belleville, had notice that Martha had diphtheria, a health officer named Arnott was sent to the house. He put up a board, painted yellow, with the notice to the public that an inmate of the house was suffering from diphtheria. This officer told the mother of Martha that the child must be isolated, explaining that the isolation meant, in the main, keeping Martha in one room, not associating with other members of the family, except the mother, and that the father, while he might go out and attend to his work, was not to hold or caress or come into contact with the child.

The man who put up the sign was told by the plaintiff—mother—that they were without food or fuel. Arnott made a list of things required, and had some of these things supplied. It was known to the defendants that other things later on were required, which were not supplied. After the 26th January down to the death of the child, she was fed principally with milk. There was difference of important character between the evidence of the father and the evidence of the defendant Dr. Yeomans; but, in my view of the case, the decision does not turn upon that difference.

Dr. Yeomans did visit the child about 11 o'clock in the forenoon of the 2nd February, and thought, and so stated, that the patient was improving, that the throat was clearing. He did not anticipate death, which occurred between 8 and 9 that same evening.

Britton, J.
1917
SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.

There was no *post mortem* examination. All the medical testimony was that it could not be said that death resulted from anything alleged to have been done or omitted by the defendants or either of them.

At the close of the case, the defendants' counsel moved for dismissal of the action, on the ground that the death was not shewn to have been caused by negligence as alleged.

I reserved my decision, and submitted questions to the jury.

The defendants called witnesses. At the close of the evidence, the defendants' counsel again, upon the same grounds and other grounds, repeated his motion for dismissal of the action.

The questions submitted and the answers thereto were as follows:—

(1) Were the defendants the Belleville Public Board of Health guilty of any negligence which caused the death of Martha Simpson? A. Yes.

(2) If so, what was the negligence, and by whom was any act of negligence committed? Or, if anything was omitted which constituted negligence, by whom was the omission? A. Lack of proper medical attention and nursing and food and fuel.

(3) Was the defendant Dr. Yeomans guilty of any negligence which caused the death of Martha Simpson? A. Yes, as a member of the Board of Health.

(4) If so, what was the negligence? A. For not giving proper attention.

(5) What damages should be awarded if plaintiffs are entitled to recover? A. \$300.

I am of opinion that there was no evidence that should be submitted to the jury that anything done or omitted by the defendants, or either of them, could be said to have caused or contributed to the death of the daughter of the plaintiffs.

This action is under the Fatal Accidents Act, and, to come within the provisions of this Act, death must have resulted from something done, or at least from something omitted, which a person, having a duty to perform, neglected to do, and death resulted from such omission.

If the medical men called could not say that death was occasioned or hastened by what is charged against the defendants, then the jury could not say, and so the question should not have been submitted to them.

In *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, it was held that the plaintiff failed, because he failed to prove that the fire which caused the damage came from the defendants' engine. In that case it is said that in every case "there must be evidence from which it can be fairly inferred, not simply guessed, that the damage was caused by the defendant."

Connacher v. City of Toronto, an unreported case, was referred to in the *Beal* case (pp. 507, 508.) The plaintiff (Connacher) complained of the failure of the city corporation to cleanse and disinfect the Brock street sewer. It appeared that sewage was allowed to accumulate about the outlet, whereby the premises surrounding the plaintiffs' premises became foul and polluted, and by reason thereof the children of the plaintiff were seized with diphtheria and three of the children died. It was held that the condition was favourable for the propagation of the germs of diphtheria, and it is probable that the germs were so transmitted as to reach the plaintiff's family, and it was probable that the children died as the result of the conditions mentioned. The plaintiff recovered a verdict. On appeal, the verdict was set aside. Armour, C.J., said (as set out in the *Beal* case, at pp. 507, 508): "Assuming . . . that the case were put most strongly against the defendants, and that they were guilty of a nuisance . . . we are unable to hold that there was any evidence from which the jury might fairly and reasonably infer that the sickness with which the plaintiff's family was affected was caused by such sewage. The theory upon which the plaintiff relied was that there might have been the germs of diphtheria in this sewage."

This phase of the case was most interestingly discussed in the *Beal* case, 19 O.L.R. at p. 508.

A somewhat similar case was cited, as having been tried by Mr. Justice Teetzel at Cayuga, in which the germs of typhoid were present, but the proof of exactly where those germs came from, and what the actual result was, was wanting.

Mr. Mikel is quite right in his understanding that the only point for consideration now is, whether there was or was not evidence as to anything done by the defendants, or left undone by them, that caused or contributed to the death of Martha Simpson.

No doubt, the amount of damages given by the jury was quite moderate if the plaintiffs are entitled to recover.

Britton,
1917
SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.

1793

Britton, J.
1917
SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.

This action is of very considerable importance so far as it involves an interpretation of the Public Health Act, R.S.O. 1914, ch. 218, especially sec. 52, sub-sec. 2, and secs. 54 and 58.

I have read with care the argument of counsel both for the plaintiffs and for the defendants. If I am wrong, the plaintiffs are entitled to recover to the amount of \$300, as found by the jury, and they should be entitled to their full costs on the High Court scale.

After as full consideration as I have been able to give to the case, my opinion is, that the action should be dismissed, but without costs.

The plaintiffs appealed from the judgment of BRITTON, J.

September 25. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. C. Mikel, K.C., for the appellants, argued that the child's death was caused by the negligence of the defendants. He relied upon the Public Health Act, R.S.O. 1914, ch. 218, sec. 58; *Regina v. Nasmith* (1877), 42 U.C.R. 242.

W. N. Tilley, K.C., for the defendants, respondents, contended that there was no connection between the alleged breach of duty by the defendants and the death of the child: *Beven on Negligence*, Can. ed., p. 134; *Grand Trunk R.W. Co. v. Griffith* (1911), 45 S.C.R. 380.

Mikel, in reply.

October 12. MEREDITH, C.J.C.P.:—If the enactment upon which this action is based be really applicable to this case, then a clear case of negligence has been proved against the defendant the Medical Health Officer of the City of Belleville, quite apart from the incredible story of the male plaintiff, negligence arising from a misunderstanding, by that officer, of his duties. The physician who had, at the instance of the male plaintiff, attended his infant child, in respect of whose death this action is brought, insisted that it was the duty of the Medical Health Officer to attend upon the child, who was suffering from a "communicable" disease, whilst that officer insisted that it was the duty of the physician, and in consequence of these conflicting views

the child was without medical attendance for several days; but apparently without being any the worse for it; for, when the Medical Health Officer did at length visit the child, on the morning of her death, he found her recovered from her disease, and apparently well on the way to complete recovery: but she died not long afterwards from what was called "paralysis of the heart," a thing said to be not uncommon in the convalescent stage of such a disease.

But, assuming the enactment to be applicable to the case, and negligence proved, the plaintiffs cannot hold their verdict unless the neglect proved was a breach of a duty which the Medical Health Officer owed to the child or to the plaintiffs; and unless it was really the cause of the child's death.

The trial Judge ruled that there was no evidence upon which reasonable men could find that the negligence proved was the cause of the child's death, and so dismissed the action notwithstanding the verdict; and so it became unnecessary for him to consider the other question.

The question whether such negligence gives a right of action, such as this, is one of much importance; and any ruling upon it must be one of wide-reaching effect, and so one that ought not to be considered in any case in which a consideration of it is, for any reason, unnecessary. The legislation in question is sec. 58 of the Public Health Act, and is in these words:—

"58.—(1) If any person coming from abroad, or residing in any municipality within Ontario, is infected, or has recently been infected with, or exposed to, any communicable disease to which this section is by the Regulations made applicable, the medical officer of health or local board shall make effective provision for the public safety by removing such person to a separate house, or by otherwise isolating him, and by providing medical attendance, medicine, nurses and other assistance and necessities for him.

"(2) The corporation of the municipality shall be entitled to recover from such person the amount expended in providing such medical attendance, medicine, nurses and other assistance and necessities for him, but not the expenditure incurred in providing a separate house or in otherwise isolating him."

App. Div.
1917
—
SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.
—
Meredith,
C.J.C.P.

App. Div.
1917
—
SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.
—
Meredith,
C.J.C.P.

Its wide effect, literally, is very apparent. It is not confined, in any respect, to indigent persons, as sec. 52 is: and is compulsory in all cases; no exception is made of any one, no matter how much better cared-for in all respects he might be if left to his own resources, subject to inspection by the public officer in the interest of the public.

The main purpose of the enactment is obviously the protection of the public against the spread of contagious and infectious diseases: the section so expressly provides: "shall make effective provision for the public safety:" but, on the other hand, it must be observed that, if compulsory and applicable to all alike, it would be a great hardship if no action lay for injury caused through the wrong of those so in control of the person injured: for instance, one capable of employing and having the best medical attendance, nursing and care, deprived of all such, and, instead, provided for, in his own home, for instance, by the Medical Health Officer or by the Local Board, and through the negligence of one or other grievously injured.

I do not say these things for the purpose of indicating what interpretation should, in my opinion, be put upon the enactment in regard to the question whether it can be deemed to be so much for the person's benefit as to create a duty to him: they are said in the hope that the somewhat extraordinary enactment may be taken into consideration elsewhere and made plainer and better before it becomes necessary to put any judicial interpretation upon it.

If the section were applicable to such a disease as small-pox only, it might perhaps be workable; but, being applicable to all "communicable" diseases to which the Provincial Board of Health may, under the Public Health Act, by their regulations, make it applicable, many difficulties in giving effect to it may arise. I have mentioned the case of a person receiving the best medical and other care and attendance, who is, notwithstanding, to be isolated by the Medical Health Officer and to be provided by him with medical attendance, medicine, nurses, and other assistance and necessities; now let me refer to this case. It was the Medical Health Officer's duty, if this case be within the section, to isolate the child and to provide medical attendance, medicines, nurses, and other assistance and necessities for her, with a right

in the municipal corporation, in each case, "to recover from such person the amount expended:" in this case a deceased infant. If all or indeed even few of the common infectious diseases of childhood are brought within the provisions of the section, the lot of the Medical Health Officer and of the municipality might each be a hard one.

But, however that may be, the plaintiffs' verdict cannot, in my opinion, be supported, for want of evidence that any such negligence was the cause of the child's death. As I have said, she was making an apparently good recovery when paralysis of the heart intervened and caused her death; and as to such intervention the evidence was: that it could not be said that the want of anything which the enactment specifies had anything to do with the child's death; that those receiving the greatest care, as well as those receiving little, were alike subject to such a termination of the disease, when all seemed to be going on well and convalescence reached.

Notwithstanding the energy and care with which this action was prosecuted throughout, no witness was called who testified that, in his opinion, any want of any of these things caused, or even probably caused, the child's death; the opinion-evidence was altogether the other way: every witness, competent to speak as a physician, was against the plaintiffs.

In these circumstances, how is it possible for the plaintiffs to succeed? The fact that the child had not the benefit of those things which the enactment in question requires, in cases coming within it, is a strong circumstance in the plaintiffs' favour; but that circumstance loses its weight in the face of the expert evidence, all one way, of the peculiar character of the child's fatal illness—paralysis of the heart. As was said by some of these witnesses: "If death had occurred from other cause, it might be said that the want of these things was the cause of it; but not when death is caused by paralysis of the heart." A verdict in the teeth of all the medical testimony is one which reasonable men could not, acting without favour, find.

The appeal should be dismissed.

RIDDELL, J. (after setting out the facts and the findings of the jury and quoting portions of the reasons for judgment of the

App. Div.
1917

SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.

Meredith,
C.J.C.P

App. Div.
1917
SIMPSON
v.
LOCAL
BOARD
OF
HEALTH
OF
BELLEVILLE.
Riddell, J.

trial Judge):—I think the trial Judge was right. In the first place, I think (as at present advised) that the Public Health Act, R.S.O. 1914, ch. 218, is clear; that the provisions of sec. 58 are explicitly “for the public safety:” the reasoning in *Gorris v. Scott* (1874), L.R. 9 Ex. 125, applies, and neither the child, during her lifetime, nor the plaintiffs, as the administrators of her estate or otherwise, had or have any right of action.

And outside of the statute there was nothing in the way of “taking charge” of the child by the defendants.

But I prefer not to base my judgment upon these considerations, important as they are—but upon the consideration that, even if there were liability to the plaintiffs for the death of their daughter if due to the negligence of the defendants, there was no evidence to indicate that the death was directly or indirectly, in whole or in part, due to such negligence.

The cases of *Beal v. Michigan Central R.R. Co.*, 19 O.L.R. 502, and the medical cases cited therein, as well as the recent case in this Court of *Reed v. Ellis* (1916), 38 O.L.R. 123, 32 D.L.R. 592, make it plain that the causal relation between the alleged negligence and the death must be made out by evidence, and not left to the conjecture of the jury.

I would dismiss the appeal with costs.

LENNOX, J.:—I agree, and for the reasons stated by my learned brother Riddell.

ROSE, J.:—For the reasons expressed by Mr. Justice Britton in the Court below, I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

[APPELLATE DIVISION]

1917

Oct. 12.

BIGRAS v. TASSE.

Negligence—Setting out Fire in Highway—Failure to Extinguish—Injury to Neighbouring Property—Liability of Foreman of Gang of Men Engaged in Work for Crown—Fire actually Set by Subordinate Member of Gang—Authority of Foreman—Liability—Fellow-servants of Crown—Respondent Superior—Relationship of Master and Servant—Negligent Act not Done in Service of Crown—Evidence.

The defendant was the foreman of a gang of workmen engaged in building a road for the Government of Ontario, in the northern part of the Province. The workmen boarded and lodged themselves. A fire was lighted in the roadway upon a day in July, in dry weather, by one of the gang, the "water-boy," for the purpose of making tea for all of them. The fire spread and destroyed property of the plaintiff upon land adjoining the roadway:—

Held, assuming that the setting out of the fire was not an unlawful act, that the failure to extinguish it was negligence, and, upon the evidence, was the cause of the plaintiff's loss.

(2) That the defendant was liable although he was away from his work on the day when the fire that caused the mischief was lighted: it was the custom of the men to light a fire each day; it was from the defendant alone that the boy who lighted the fires got his authority to do so; and there was nothing in the evidence to shew that the defendant gave any orders or warning to the men to extinguish the fire after it had answered its purpose.

(3) That in making the road the workmen were servants of the Crown, but not in making the fire, which was for their own benefit and their own act.

Per RIDDELL, J. (dissenting):—The relation of the defendant and the boy was not that of master and servant; they were equally servants of the Crown; and, as between them, the maxim *respondent superior* had no application. Assuming that the loss of the plaintiff was due to the negligence of the boy, while the defendant could not hide behind the Crown and say *respondent superior*—for the Crown can neither commit nor command a tort—he was not liable for any negligence or default of those in the same employment. He would be liable if the boy, who was under his orders, were ordered by him to do any act necessarily or naturally dangerous; but there was no evidence that the defendant ordered anything to be done from which danger should have been anticipated. Assuming a command to make a fire, it was not a command to set it in a dangerous place or to set it negligently. The defendant was not to anticipate negligence; and, the relation of master and servant not existing, he was not liable for the negligence of another.

Feather v. The Queen (1865), 6 B. & S. 257, and *Hiscox v. Lander* (1876), 24 Gr. 250, 266, referred to.

Per LENNOX, J.:—Review of the authorities, including the above.

Judgment of the District Court of the District of Sudbury affirmed. ✓

AN appeal by the defendant from the judgment of the Judge of the District Court of the District of Sudbury, after trial of the action without a jury, in favour of the plaintiff, for the recovery of \$217 damages with costs.

The action was brought to recover damages for the loss of a house, barn, and other property of the plaintiff, destroyed by fire. The plaintiff alleged that the fire which destroyed his proper-

1917
BIGRAS
v.
TASSE.

ty had spread to his land from a fire negligently set in a highway by order of the defendant.

The defendant was the foreman of a gang of workmen engaged in building a road for the Government of Ontario. He employed one Arthur Richer as a labourer, and Richer's son, Thomas, as "water-boy." The boy lighted a fire on the roadway in order to make tea for the workers. The fire spread, reached the buildings of the plaintiff, and destroyed them.

September 26. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Harcourt Ferguson, for the appellant, argued that the relationship of master and servant did not exist between the defendant and the boy Richer. The two were fellow-employees of the Crown, and so the defendant could not be held liable for the boy's negligence, even if the boy was negligent: *Hiscox v. Lander* (1876), 24 Gr. 250; *Morier v. St. Paul Minneapolis and Manitoba R.W.Co.* (1884), 47 Am. Rep. 793; Beven on Negligence, 3rd ed., p. 579. At any rate, the defendant was not with the gang on the day when the fire was set out. Either the boy's father or another man gave the boy instructions to start the fire that day. The setting out of the fire was not in itself an unlawful act.

T. M. Mulligan, for the plaintiff, respondent, contended that the Crown could not be guilty of a wrong. As between the defendant and the boy, the relation of master and servant existed, as the defendant was the foreman of the whole gang, and it was from him that the boy took his orders to light a fire in the first place. Therefore the defendant was liable for the negligence of the boy. Even if the setting out of the fire was not in itself negligence, the starting of it near a lot of stubble was negligence.

Ferguson, in reply.

October 12. MEREDITH, C.J.C.P.:—I find it difficult to understand how it can be contended reasonably that the Crown was concerned in any of the matters out of which this action has arisen.

The Crown was not making, or concerned in the making of, tea for the workmen. They boarded and lodged themselves. The lighting of a fire daily for the purpose of heating their cold tea

was entirely for their own benefit and their own act; and so, if there were any negligence in connection with it, they were all alike answerable for that negligence, however much or however little any of them may have had to do with it. It was very obviously the duty of each one of them to take care that the fire was sufficiently extinguished, as to cease to be dangerous, before leaving it. The time of the year, and the state of the weather and the character of the country, in which these fires were lighted, made care in extinguishing them a very obvious need and duty.

And I am quite unable to say that the learned Judge who tried this case was wrong in finding that there was a want of such care which was the cause of the plaintiff's loss.

Then does the defendant escape liability because he happened to be away from his work on the day when the fire that caused the mischief was lighted?

If he were merely one of the workmen who merely warmed their tea or lighted their pipes at the fire, there might be a good deal to be said in favour of his escape; but he was not: he was the foreman of all these workmen, and of the workboy who actually lighted this fire; and it was from him alone that the boy got his authority and order to light such fires. He was the author of this practice of having the fire lighted daily by this boy. And, in regard to extinguishing it, there does not seem to have been any difference on this from any other day. The defendant was at least the moving spirit in the establishment and maintenance of this practice, as would naturally be expected, he being the leader of the men and foreman of the work which was being done.

I cannot think that his absence on that day exculpates him; indeed, there seem to be special reasons for holding him responsible, for, though he was such leader and though he authorised and directed the lighting of these mid-day fires for the purposes I have mentioned, and notwithstanding the obvious danger of such fires unless extinguished, there is nothing in the evidence to shew that he gave any orders or any warning to the boy or to any one else to extinguish the fire after it had answered its purpose.

And on the day when the mischief was done, and whilst the danger was apparent, and this defendant was there and seeing it, no sufficient steps were taken by him and the men under him to save the plaintiff's property from injury from the running of the

App. Div.
1917

BIGRAS
v.
TASSE.

Meredith,
C.J.C.P.

App. Div.
1917

BIGRAS
v.
TASSE.

Meredith,
C.J.C.P.

fire of the mid-day of the day before, which had not been extinguished. It was their duty then to take efficient means of staying, if they reasonably could, the further spread of the fire. They moved a mile away without doing so.

Everyone who has any part in making, or keeping up, a fire such as that in question, has great disregard for the rights and interests of others, as well as for the public interests, if he fail to take care that the fire is safely extinguished.

I am in favour of dismissing the appeal; on the assumption, without considering the question, that the setting out of the fire was not an unlawful act; that the plaintiff must prove negligence in lighting or maintaining it, or in failure to extinguish it, to entitle him to a judgment in his favour.

LENNOX, J.:—In the summer of 1915, the Ontario Government were building a road in the district of Sudbury. The defendant was the foreman, and, so far as appears, the sole Government representative in carrying out the work. He employed the workmen, gave them instructions and directions, and controlled, or had power to control, their operations.

At mid-day, in very dry weather, about the middle of July, one of the workmen kindled a fire in order to make tea for the gang, and allowed it to escape from the roadway where it was lighted and get upon the plaintiff's property, where it destroyed buildings and effects to the value of \$217.

I do not in any way question the accuracy of the law enunciated in the judgment of my learned brother Riddell, *infra*, but, with great respect, I am of opinion that it does not cover all the ground necessary to be gone over in considering the appeal.

It is quite true that, if the negligent act complained of, relied on by the learned trial Judge, and shewn by the evidence, was the act of the Crown, the plaintiff has no legal remedy; for, in contemplation of law, the Crown cannot be guilty of negligence—can do no wrong. The defendant was not present at the time the fire was kindled. That, at the time and in the place where it was kindled, it necessarily involved risk of loss to the plaintiff, was not and could not be denied. There had been continuous hot weather for days. There was a high wind blowing towards the plaintiff's property, and inflammable material near at hand;

and, although it is said the whole gang did their best in fighting the fire, it was out of control almost immediately. The alternative inferences of negligence *as a matter of fact* are manifest; either what is said to have been done to control the fire was not done—the workmen could have kept, but failed safely to keep, the dangerous thing upon their own premises, the roadway, and were negligent *in fact* in allowing it to escape; or, on the other hand, the danger was obvious from the first, and they should have foreseen it, and were negligent *in fact* in lighting the fire and incurring the risk. I am for the moment speaking of negligence as it is usually presented, want of ordinary care as between individual litigants only; I am eliminating for the time being the question of the Crown. I attach no importance to the question of who actually kindled the fire—it was probably the boy Thomas Richer, who was principally employed as a water-carrier, but the men were all at their mid-day meal at the time. Nor is it important to inquire precisely when or how the defendant gave instructions for lighting fires and boiling water from day to day, or that he gave verbal instructions at all; it is enough that he knew that it was being done, and it is certainly enough that he knew of, sanctioned and adopted it as part of the working method by which the operations were carried on, gave no specific directions how or where it was to be done, and took no precautionary measures.

Arthur Richer, the boy's father, said: "I was working on the road under the defendant as foreman, in July, 1915. I was there when fire was started by one of the gang—my son, who was water-boy. He started it to make tea for the gang. I had orders to tell him—my orders were from the foreman. This day, I think, either I or Louis Dini had told him to make the fire. Before this the boy was told. Tasse would sometimes tell the boy about starting the fire. A large pail was brought to make tea in. The defendant instructs the boy to make the tea." (And it used to be said, "You can't make an omelette without breaking eggs.") "The fire started by my son spread into Bigras' bush. . . . It was only at noon that tea was made. Tasse was not there when this particular fire was started, and the order was given by either Dini or myself. I never heard Tasse say anything *about where to build the fire or how to make it*. I never heard him say to start the fire, but I heard him say: 'Have you lots of water ready? It will soon be time

App. Div.
1917

BIGRAS
v.
TASSE.

Lennox, J

App. Div.
1917
BIGRAS
v.
TASSE.
Lennox, J.

to make the tea.' I cannot now remember him say anything else. The wind made the fire get away from my boy. He did not get away from the fire—he tried to put it out. *It did not take 5 minutes for the fire to get out of bounds.* He started the fire about 8 ft. from middle of road near green hay, but there was some dry stubble. . . It was either Dini or myself told the boy to start the fire that day. Tasse gave orders before that day."

The boy, Thomas Richer, said: "Mr. Tasse told me to start the fire, not that day. I cannot say when he told me. It was at 10 minutes to 12 one day he told me to make the fire. Not this particular day that the fire was started."

Louis Dini said: "Thomas Richer made the tea." I presume he meant generally. And Napoleon Bigras said: "I was there when the boy started the fire. Tea had been heated on other days before the fire." I do not understand him to mean in front of the fire, but it would not matter if he did.

The defendant, Tasse, does not pretend to say that he did not sanction and approve of what was being done from day to day. He says he did not tell the boy to do this work. He does not contradict the father. He said: "The fire was made for tea for the gang. I took some of the tea. I did not bring any. . . . Next morning we passed by and we saw no danger, as the wind was blowing the other way from the buildings. . . The fire was then within 25 or 30 feet of the buildings. . . . The weather before this fire was dangerous to start a fire. Where the boy started it, it was not dangerous. I had tea before this, hot tea. I saw him light the fire—did not object to his doing it. Did not tell him to do it." And, referring again to their loss of time and successful fire-fighting the day before—before the day the fire was started—and shewing the conditions on that day, he says: "If we had not put out the fire the first day it would have burned the buildings."

The maxim, "The King can do no wrong," invoked for the protection of the defendant, is not altogether one-sided or necessarily an answer to the plaintiff's claim, for, as the King cannot commit a tortious act, it follows that, while the authority of the Crown will protect its servant or agent from civil personal liability for every act performed in the due and legitimate execution of his office, even if this involves an invasion of private rights, the authority of the Crown to act negligently or without ordinary

and reasonable care or with reckless disregard of the rights of others, in the carrying out of any work or the performance of any duty, can never be presumed. And where, as here, the undertaking itself is not objected to or questioned, is capable of being carried on and completed without injury to the plaintiff or anybody, and without the commission of the acts complained of, as this work clearly appears to have been, where the attack is not upon the undertaking or the prescribed method of its execution, and no redress, of grace or of right, is sought against the Crown, and where the action, as in this case, is for damages against the defendant personally for avoidable injury caused by his failure to exercise reasonable and ordinary care, and gross negligence is charged, and, as I think, abundantly established against him, as to matters which could not be presumed to be necessary or incidental to the proper carrying out of the undertaking authorised by the Crown, the onus is upon the defendant, a servant of the Crown, to establish not only general authorisation to do the work, but specifically that in committing the alleged wrongs he was executing the work in the manner authorised or directed by the Crown; in other words, that the alleged wrongful acts or omissions were not his acts, but the acts or omissions of the Crown, and therefore, in contemplation of law, not wrongful. If upon the evidence he has satisfied this onus, he has sustained his appeal, and is entitled to have the action dismissed: *Hiscox v. Lander*, 24 Gr. 250.

But there was no proof; it was all left to presumption. Beyond the tacitly admitted fact that the road-making was a public work, I can find no evidence of authority of any kind beyond the bald statement that the defendant was the foreman and the Government official having sole charge of the roadway and the employees. It is not enough to say: "The road-building was a public work of the Province, and I was the foreman; and it is to be assumed by the Court that all that is complained of was authorised by the Crown." Why should it be assumed? In the early days of settlement, clearing the land was everywhere, and still is in many parts of the Province, a primary condition of permanent occupation, and the setting out of fires was and is an indispensable accompaniment. Notwithstanding the recognised necessity of employing fire as a handmaid of clearing

App. Div.

1917

BIGRAS

v.

TASSE.

Lennox, J.

App. Div.
1917

BIGRAS
v.
TASSE.

Lennox, J.

and cultivation, it was always recognised as a useful but dangerous servant, and from the earliest times until to-day the Courts, to the knowledge and with the approval of the Legislature, have uniformly insisted that the man who kindles or sets out a fire upon his premises must, by taking into account the season of the year, the wind and the weather, the condition of adjoining or neighbouring land and buildings, the giving of timely notice, the employment of adequate assistance, and otherwise according to the circumstances, exercise reasonable care and diligence to prevent injury to his neighbours.

It is common knowledge that sections of alternate earth and rock of the character of the territory in which this road was built are more liable to be subjected to accidental summer fires, and the fire is liable to spread over a wider range of country, than where the land is unbroken and of better quality; and the consequence of this is, that greater precautions ought to be, and usually are, observed. This perhaps accounts for the notices posted in the smoking cars on trains running between the east and the west, and in New Ontario, warning passengers not to drop stubs of cigars or cigarettes from the cars. This certainly was one of the reasons for proclaiming Northern Ontario "a fire district."

The Legislature has been alive to the peril of bush fires, and has recognised the need of supplementing the common law by many specific enactments now embodied in R.S.O. 1914.

The Railway Act, ch. 185, secs. 104 and 138, compels a railway company to keep its right of way clean and free from inflammable refuse, to maintain an adequate and efficient staff of fire-rangers, to patrol the line, etc.

The Forest Fires Prevention Act, ch. 241, empowers the Lieutenant-Governor in Council to proclaim any part of Ontario a fire district, and provides for a semi-close fire season within the district proclaimed from the 1st April to the 1st November in any year, and provides for the appointment of fire-rangers and for penalties.

And, without attempting to be exhaustive, I refer to the Fire Guardians Act, ch. 242. This is an important Act, and shews clearly the trend of the legislative mind. The council may appoint fire guardians. After their appointment (I am speaking only in general terms) no one shall set out any fire in any place where it

would be likely to spread between the 1st July and the 1st October, without first obtaining permission in writing from one of the two fire guardians for his polling subdivision. The starting of a fire without permission is *primâ facie* evidence of negligence. The guardian applied to for permission shall examine the place designated before granting it, and may refuse it. The permission cannot be pleaded in bar or mitigation of damages claimed for negligently setting out the fire. A penalty of \$100 may be recovered for contravention of the Act. The revised statute (ch. 242) is founded upon 2 Geo. V. ch. 62, a statute long antedating the execution of the Government work in question.

Confronted by all these facts and circumstances and statutory provisions, how could it be assumed, even if inferences could be accepted as the substitute for actual proof, that the Crown authorised and intended the defendant to act, as he did act, in reckless and callous disregard of the safety of settlers for scores of miles from either side of the road he was constructing? On the contrary, though it is immaterial, the presumption is clearly the other way.

In *Hiscox v. Lander* the judgment of Chancellor Spragge was not concurred in by a majority of the Court on rehearing, but the ultimate decision in no way conflicts with the statements of the law in the extract I am about to make. The learned Chancellor, in his judgment at the trial, said (p. 251): "There is, I apprehend, nothing in the fact of the act being done by a person acting in a public capacity that *per se* exonerates him from liability. No one can say, 'My acts cannot be called in question in a Court of justice because they were acts done by me in my public character.' That of itself is no answer. The answer must be that the act for which the party is called in question is an act authorised by the Legislature."

It is not a question of official position, where the act is *primâ facie* or *per se* wrongful; but, was the act, otherwise wrongful and actionable, authorised by the Crown? As stated by Mr. Justice Blackburn in *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, at p. 112: "The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorised by the Legislature."

Feather v. The Queen (1865), 6 B. & S. 257, was an action to

App. Div.
1917
BIGRAS
v.
TASSE.
Lennox, J.

App. Div.
1917

BIGRAS

v.

TASSE.

Lennox, J.

recover from the Crown, by petition of right, compensation for the use of a patented device of the suppliant. The right to maintain the petition was objected to by demurrer. It was held that exclusive rights, conferred in the usual general terms, did not exclude user by the Crown without payment. It was stated, if not decided, that if the petitioner had any right it was not against the Crown but against the officer of the Crown using the patented device; that, to bind the Crown, the Crown must be specifically named. In delivering the judgment of the Court in favour of the Crown, Chief Justice Cockburn, at pp. 295, 296, said: "Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong, it follows, as a necessary consequence, that the King cannot authorise wrong. For to authorise a wrong to be done is to do wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorised it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests upon such a foundation, falls at once to the ground."

I quote mainly for what follows; and to shew that the right of action against the subject for negligence is not interfered with. The learned Chief Justice proceeds: "Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a Minister of the Crown is without a remedy. As the Sovereign cannot authorise wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of State for an injury done by the authority of the Crown, but he altogether failed to make good that position."

After pointing out the meaning of *Buron v. Denman* (1848), 2 Ex. 167, he proceeds: "The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants, *Money v. Leach* (1765), 3 Burr. 1742, and the cases of *Sutton v. Johnstone* (1786), 1 T.R. 493, and *Sutherland v. Murray* (1783), 1 T.R. 538, there cited, are direct authorities that an action will lie for a tortious act notwithstanding it may have the sanction of the highest authority in the State."

The law as here declared presents much more formidable barriers in the way of the defendant than I have ventured to suggest, for not only has the defendant failed to prove authority, but the Court should presume that he was not authorised; and further evidence could not properly be accepted, for "an action will lie for a tortious act notwithstanding it may have the sanction of the highest authority in the State." But, as this is *obiter dictum*, though necessarily of great weight, I prefer to rest my judgment upon the absence of proof of the authority of the Crown, and to adopt the statement of Mr. Justice Blackburn in the *Mersey Docks* case where he says (L.R. 1 H.L. at p. 112): "If the Legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful. . . ." And: "Though the Legislature has authorised the execution of the works, it does not thereby exempt those authorised to make them from the obligation to use reasonable care that in making them no unnecessary damage be done." Or, as said by Mr. Justice Crompton in *Brine v. Great Western R.W. Co.* (1862), 2 B. & S. 402, at p. 411: "The distinction is now clearly established between damage from work authorised by statute, where the party generally is to have compensation and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains;" and upon the authority of cases such as *Money v. Leach*, *Sutton v. Johnstone*, and *Sutherland v. Murray*, in which the principle here to be determined was directly in issue.

It will be sufficient to refer to *Sutton v. Johnstone*, in which the direct ground of complaint was, that the defendant had not acted within the scope and extent of his authority as commander of the Bristol fleet. In that case there had been two trials. On the second

App. Div.

1917

BIGRAS

v.

TASSE.

Lennox, J.

App. Div.
1917

BIGRAS
v.
TASSE.

Lennox, J.

trial, the plaintiff was awarded £6,000 damages, and a motion was made in arrest of judgment. Baron Eyre, delivering the unanimous judgment of the Court of Exchequer, 1 T.R. at p. 503, said: "The commander in chief of a squadron of ships of war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation. The propositions, which attempt to establish a distinction for him, are dangerously loose and indefinite. It is said, subordinate officers may be brought to a court-martial for improper conduct, and that no action lies for anything done in a course of discipline, and under powers incident to situation. If, by *improper conduct*, be meant a breach of articles for the government of the navy; if, by *a course of discipline*, be meant, exacting that which the discipline of the navy requires; if, by *what is done under powers*, be meant that which is warranted to be done under those powers; it will be agreed simply, for doing any of those acts no action will lie; for those are lawful acts in themselves, and there is nothing added to make them unlawful in the particular case." And, referring to what might be done "under powers incident to his situation," the learned Baron continues: "But in respect to the first branch of this proposition, if it be meant that a commander in chief has a privilege to bring a subordinate officer to a court-martial for an offence which he *knows* him to be innocent of, under colour of his power, or of the duty of his situation to bring forward inquiries into the conduct of his officers, the proposition is too monstrous to be debated. . . . And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the *extent of power*, and touching the *abuse* of it. Cases may be put of situations so critical that the power ought to be unbounded: but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity."

We were referred by Mr. Ferguson to Beven on Negligence, 3rd ed., p. 579, and an American case, cited in the foot-note, *Morier v. St. Paul Minneapolis and Manitoba R.W. Co.*, 47 Am. Rep. 793. The law as there discussed has no bearing on the questions to be determined upon this appeal. It relates to doctrines affecting the

relation of master and servant, and no such question directly arises here. However, I am clearly of opinion that the defendant's claim of immunity by reason of being a servant of the Crown fails.

This is the only question argued, or at all events seriously urged, before us. It is, perhaps, right, however, that I should consider two other questions, namely:—

(a) Is the defendant answerable for the act of the boy?

(b) Did the defendant fail to exercise reasonable and ordinary care?

The boy and the defendant were both servants of the Crown, but none the less the defendant was in sole charge of the undertaking, he had full control and direction of the gang—including the boy—and he was a person to whose orders and directions the boy was bound to conform, and did conform. The responsibility in this case is not dependent upon any question of master and servant. The defendant directed, or, if he did not verbally direct (and there is abundant evidence that he did), he at all events knew and approved of and authorised what was being done from day to day, and, he concurring in and authorising what was done, from day to day and on that day, it was, in law, his act—his own act—as conclusively as if he had struck the match with his own hand. I can best describe the defendant's position as to this point by quoting again one sentence from the judgment of Chief Justice Cockburn in *Feather v. The Queen*, 6 B. & S. at p. 295: "For to authorise a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorised it to be done."

Was it negligent and wrongful? I have more than once indicated my opinion, but have not stated the facts, as I think the thing speaks for itself. Assuming the defendant to be a rational man—and he was the foreman and supervisor of a Government work, and the duty of taking ordinary care is imposed alike on the wise and the simple—he could not fail to know that a wholly unprotected fire on that road, during the continuous dry weather of which he speaks, was liable any day to set the whole countryside in a blaze; and yet, without a word of warning or advice, he leaves all to chance, when a four foot square sheet of iron, curved and placed to intercept the wind, would have reduced the risk by

App. Div.
1917

BIGRAS
v.

TASSE.

Lennox, J.

App. Div.
1917
BIGRAS
v.
TASSE.
Lennox, J.

perhaps ninety per cent., and the use of a small coal oil stove would have completely eliminated the danger. If he was not there on the night of the day in question, he was there next morning, before any actual damage had been occasioned, saw the fire which he had originated, and "passed by on the other side."

The appeal should be dismissed with costs.

ROSE, J., concurred.

RIDDELL, J. (dissenting):—An appeal from the District Court of the District of Sudbury.

The Government of Ontario were, during the summer of 1915, building a road in the newer part of Ontario, their foreman being the defendant. The foreman employed one Arthur Richer as a labourer on the work and his son as a water-boy, "to carry water," "to get good water." This boy, Thomas Richer, made a fire apparently on the roadway, to make tea for the workers: the fire spread, and, notwithstanding the efforts of the defendant and his men, reached the buildings of the plaintiff, an adjoining settler, and destroyed them. The plaintiff sued the foreman, and the learned District Court Judge gave him judgment for \$217 and costs. The defendant now appeals.

The relation of the defendant and the boy was not that of master and servant, the boy was equally with the foreman the servant of the Crown—accordingly, as between the defendant and the boy, the maxim *respondeat superior* has no application.

Assuming that the loss of the plaintiff was due to the negligence of the boy (of which I find little, if any, evidence), the position of the foreman is clear.

While he cannot himself hide behind the Crown and say *respondeat superior*, since the Crown can neither commit nor command a tort (*Feather v. The Queen*, 6 B. & S. 257), he is not liable for any negligence or default of those in the same employment as himself: *Hiscox v. Lander*, 24 Gr. 250 (especially at p. 266), and cases therein cited. But he would be liable if the boy, who was under his orders, were ordered by him to do any act either necessarily or naturally dangerous.

In the present case I can find no evidence that the defendant ordered anything to be done from which danger should have been

anticipated. On the day in question, he gave no orders to the boy, who seems to have received instructions from either his father or another workman, Dini. In any case, the only thing the defendant is proved to have said was to the boy's father: "Have you lots of water ready? It will soon be time to make the tea." Assuming that this was an implied command to make a fire, it was not a command to set the fire in a dangerous place or to set it negligently. The defendant was not to anticipate negligence of any kind; and, in the absence of the relation of master and servant, he is not liable for the negligence of another.

I would allow the appeal and dismiss the action, both with costs.

Appeal dismissed with costs; RIDDELL, J., dissenting

[APPELLATE DIVISION.]

SOUTHBY v. SOUTHBY.

Husband and Wife—Money Deposited in Bank to Joint Credit of—Written Direction to Bank—"Our joint Property"—Claim of Wife to Half of Money—Evidence—Admission—Origin of Fund—Beneficial Interest of Wife—Savings from Housekeeping Allowance—Gift from Husband—Special Purpose of Deposit.

The plaintiff and defendant—wife and husband—opened a joint account in a bank in May, 1915, and both signed a direction to the bank: "All moneys which may be deposited by us or either of us to the said account are our joint property, but such moneys may be withdrawn by either one of us, or the survivor of us." The money deposited to the credit of the account was all the defendant's, and the purpose for which it was deposited, viz., to pay the expenses of the plaintiff and her child, during the defendant's absence, and to make payments in connection with the defendant's property, was shewn in evidence:—

Held, that the plaintiff was not entitled to half the money to the credit of the account at the time of the commencement of this action in September, 1916.

Per MEREDITH, C.J.C.P.:—The writing was not a contract between the parties; it was merely a direction to the bank, for the bank's protection; it was none the less evidence against the defendant, as an admission made by him, but as an admission only. The money was not the joint property of the parties before deposit, it was the defendant's; and the money was not in reality their joint property after deposit, for it was to be used by the plaintiff for the payment of obligations in respect of the defendant's property, and for the support of his family. And, as, according to the direction, the money might be withdrawn by either party, the defendant was at liberty to withdraw it for his own benefit; the plaintiff had not proved any beneficial interest in it which would limit his right of withdrawal to withdrawal for some specific purpose or use.

Per RIDDELL and LENNOX, JJ.:—The plaintiff was not entitled to any part of the money, on the ground that she had given to the defendant her savings from a housekeeping allowance which he made her: such savings would not become hers without his consent (unless they were living apart). Nor could the plaintiff, upon the strength of the written direction, establish a claim to any part of the money as a gift: the money was not intended to be a provision for her—placing it to joint account was simply a mode of conveniently managing the defendant's affairs.

App. Div.
1917

BIGRAS
v.
TASSE.

Riddell, J.

1917

Oct. 12.

1917

SOUTHBY
v.
SOUTHBY.

AN appeal by the defendant from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiff, in an action for a declaration that half the money in a savings bank in Toronto, deposited to the credit of the plaintiff and defendant—wife and husband—jointly, was the property of the plaintiff, the wife.

September 27. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. S. Lundy, for the appellant. The defendant had a legal right to draw all the money out of the bank. His wife, the plaintiff, had no interest in the money deposited, and the arrangement between him and her was entirely for their own convenience, and the memorandum signed at the bank was signed simply as a protection to the bank. The evidence shews that there was no intention whatever of giving the plaintiff any interest in the amount on deposit in the bank, other than a right to draw it out, which was given solely as a matter of convenience. There is no evidence of any voluntary bestowment of the money. The wife had no right to the money which she says she saved out of her housekeeping allowance: *Anning v. Anning* (1916), 38 O.L.R. 277, 34 D.L.R. 193, and cases there cited.

J. F. Boland, for the plaintiff, respondent. The placing of the money to a joint account was a gift to the plaintiff of half the money placed at any time in the account. A joint ownership in personalty requires unity of possession, interest, title, and point of commencement: Halsbury's Laws of England, vol. 22, sec. 823. The true test is, what would be the rights of the husband if the positions were reversed, and the wife had withdrawn the entire fund? There cannot be a different rule for the two. Reference to the following authorities: *Re Ryan* (1900), 32 O.R. 224; *Schwent v. Roetter* (1910), 21 O.L.R. 112; *Weese v. Weese* (1916), 37 O.L.R. 649; *Ferris v. Hamilton* (1862), 9 Gr. 362; *McCandy v. Tuer* (1874), 24 U.C.C.P. 101; *In re Young* (1885), 28 Ch.D. 705; *Edward v. Cheyne* (No. 2) (1888), 13 App. Cas. 385; *Lovell v. Newton* (1878), 4 C.P.D. 7. The money which the plaintiff saved from money given her by her husband for housekeeping expenses became hers absolutely.

Lundy, in reply.

October 12. MEREDITH, C.J.C.P.:—There is, in my opinion, no justification in law for the judgment which the plaintiff has been awarded in this action; whether from any other point of view it would be “only just and fair” that “each should be regarded as having an equal share” in the money in question, “as each had contributed to the creation of the fund,” is not a question for our consideration, nor is it a thing which should influence our judgment, unless, by reason of such contribution, whatever it may have been, the law confers such a right.

The money in question is the amount which, at the time of the commencement of this action, appeared in the books of an agency, in Toronto, of the Molsons Bank, to be standing to the credit of “A. H. Southby or Minnie Southby”—the former being the defendant and the latter the plaintiff in this action—in “savings bank account No. 2760.”

The account was opened at the time when the defendant, who is the husband of the plaintiff, was going to Montreal, to work and live there, whilst his wife and son remained at Toronto, the son going to school there; that was in May, 1915; and it seems to me to be made plain by the circumstantial evidence, as well as by the testimony adduced at the trial of this action, that the purpose of that account being then opened was to enable the wife to draw such money as might be needed in the plaintiff’s property interests in Toronto, as well as in the separate maintenance of the wife and child, rendered necessary by the defendant’s absence in Montreal, though such needs were to be further supplied, as they were, by remittances from time to time from the husband to the wife.

The moneys deposited in this account were from first to last the moneys of the defendant only. It is idle to talk of any part of these moneys having been really in law the plaintiff’s moneys, because she testified that she thought she had \$45 when she was married to the defendant in June, 1898, or that she had worked at \$7 a week from June to December in that year, or because she had sometimes accumulated some savings out of moneys given to her by him for their housekeeping expenses, or because he had at one time taken a mortgage in her name and at another time an agreement to purchase land in like manner. The whole body of this savings bank account is a deposit made by the husband on

App. Div.
1917

SOUTHBY
v.
SOUTHBY.

Meredith,
C.J.C.P.

App. Div.
1917

SOUTHBY
v.

SOUTHBY.

Meredith,
C.J.C.P.

the 8th day of June, 1916, a day after his wife and son had left Toronto and gone to live with him in Montreal. That deposit was of the proceeds of a sale of his land, the amount of it being \$2,130.19, about \$125 more than the amount of the account at the time of the commencement of this action in September, 1916.

What the plaintiff's claim is really based upon, and that which alone, as it seems to me, gives any ground for an argument in support of it, is the writing which the bank obtained from both parties to this action, at the time when the account was opened, in these words:—

"The Molsons Bank,

"To the Manager West Toronto, Ont.; Branch.

"Dear Sir: We, the undersigned, request you to open a joint account in our names. All moneys which may be deposited by us or either of us to the said account are our joint property, but such moneys may be withdrawn by either one of us, or the survivor of us.

Yours truly,

"MINNIE SOUTHBY.

"A. H. SOUTHBY."

But this writing is in no sense a contract between the parties to this action; it is merely a direction to the bank, in the form of a letter addressed to the bank's manager at its branch in which the account was opened; and is wholly in a printed general form, prepared and supplied by the bank, for its protection only; it is none the less evidence against the defendant, as an admission made by him, but as an admission only.

The letter describes the moneys to be deposited as "our joint property," but adds, "such moneys may be withdrawn by either one of us, or the survivor of us." It is of course open to either party to shew that the statement that the moneys "are our joint property" was, as between these parties, though not as to the bank, inaccurate: and, if the words meant "our joint property before the deposit," that was, as I have said, not so, they were the defendant's, the proceeds of the sale of his land; and, if it meant after deposit, it was also inaccurate, for in reality they were his moneys to be drawn by his wife for the payment of

his obligations in connection with his property, as well as with his family.

And, if we look at the literal meaning of the letter, the defendant was quite within his legal right in withdrawing all the money, to the credit of the account, when he did: "such money may be withdrawn by either one of us." His withdrawal could be wrong in law only if, apart from this writing, the defendant were precluded from withdrawing the money for his own benefit, and there is no evidence of any fact which in law precluded him from doing so: the plaintiff has entirely failed to prove any beneficial interest in it which would limit his right of withdrawal to withdrawal for some specific purpose or use.

The appeal should, in my opinion, be allowed, and the action dismissed.

RIDDELL, J.:—The plaintiff claims a declaration that half the money in an account in the Molsons Bank, West Toronto, is hers.

The account was opened by the defendant, her husband, and herself, in May, 1915, under a direction signed by both in the following terms:—

"The Molsons Bank.

"To the Manager West Toronto, Ont., Branch.

"Dear Sir: We, the undersigned, request you to open a joint account in our names. All moneys which may be deposited by us or either of us to *the said account* are our joint property, but such moneys may be withdrawn by either one of us, or the survivor of us.

"Yours truly,

"MINNIE SOUTHBY.

"A. H. SOUTHBY.

"Dated at West Toronto, Ont.,

"May 4, 1915.

"Memo. for Branch.

"Account opened as No. 2760."

The defendant, who had been living with the plaintiff, his wife, in Toronto, was going to Montreal in May, 1915, his wife to remain in Toronto. He had some property in Toronto, mortgages outstanding, rents to be collected, etc., and the wife was to

App. Div.
1917

SOUTHBY
v.

SOUTHBY.

Meredith,
C.J.C.P.

App. Div.
1917

SOUTHBY
v.

SOUTHBY.

Riddell, J

attend to all his business in this city. As the wife says: "He said that he would take me over to the bank and put the money in a joint account . . . I had to stay here to look after (my son at school) and also look after our property here . . . he told me there were certain payments . . . he told me to draw any money out that I would need at any time and told me to pay any small bills and such like."

There is no pretence that any of the money originally placed in the "joint account" was in the name of the plaintiff. She had, indeed, before May, 1915, let her husband have money from time to time: but this was money she had been able to save out of the housekeeping money which he allowed her in varying amounts for household expenses while they were living together.

The moneys she thus let him have were merged in his general account, which ultimately had by May, 1915, come to \$215.62, placed to "joint account."

All subsequent deposits in the joint account were from rents collected from the defendant's property, from a mortgage belonging to the defendant, but put in his wife's name for convenience, etc.—none of the money was from the wife's earnings.

The grounds upon which the wife claims are apparently two in number:—

1. That the money she saved from money given her by her husband for housekeeping, "or to buy clothes or such like," became hers to do with as she pleased, and what she did not spend remained hers, her "housekeeping savings" were hers absolutely.

2. And in any case the placing of money in a joint account was a gift to her of half the money placed at any time in the account.

I do not think either of these contentions can be sustained. The law is quite clear—the Court will not prevent a husband from giving his wife what profit she can make out of his cows, poultry, etc., as "but a reasonable encouragement to the wife's frugality," especially where there is "no creditor of the husband to contend with:" *Slanning v. Style* (1734), 3 P. Wms. 334, especially at pp. 338, 339; but savings by her out of moneys allowed for household expenses, etc., do not become hers without his consent (unless they are living apart): *Eversley on Domestic Relations*, 2nd ed., p. 294; *Barrack v. McCulloch* (1856), 3 K. & J.

110: "Any money given to her by her husband for household purposes, or for dress, or the like . . . would belong to her husband:" p. 114, *per* Page Wood, V.-C.—and the same fate would attach to investments made of such moneys: *ib.*

There can be no pretence, therefore, that the plaintiff had any claim to any part of this money in law: and she must rely upon the "joint property" document.

2. It is of importance to understand precisely why this document was made. As has been said, the defendant was going to Montreal, leaving his wife behind in Toronto—he had made certain mortgages, upon which payments were falling due in Toronto, and the reason of making the joint account was, that the wife might draw out any money needed to make the accruing payments on the mortgages and "pay all small bills and such like." It is impossible to deduce from this any intention on the part of the husband to make a present to his wife of any part of this money. It is unnecessary to go through the cases—the result is fairly stated in *Lush on Husband and Wife*, 3rd ed., p. 211: "All the surrounding circumstances of the case should be taken into consideration to determine whether a gift or a resulting trust was intended:" and, if the conclusion is that "it was not intended to be a provision for the wife, but simply a mode of conveniently managing the" husband's "affairs . . . it leaves the money . . . still his property:" *Marshal v. Crutwell* (1875), L.R. 20 Eq. 328, at p. 331, *per* Jessel, M.R.

For the strictness with which a gift of this kind must be proved, see *Mews v. Mews* (1852), 15 Beav. 529.

The case of *Everly v. Dunkley* (1912), 27 O.L.R. 414, 8 D.L.R. 839, may also be consulted: there a very similar matter was under consideration, and the like conclusion reached.

I would allow the appeal with costs here and below.

LENNOX, J., agreed with RIDDELL, J.

ROSE, J., agreed in the result.

Appeal allowed.

App. Div.

1917

SOUTHBY

v.

SOUTHBY.

Riddell, J.

1917

[APPELLATE DIVISION.]

Oct. 12.

MAY V. HAINER.

Trusts and Trustees—Absolute Conveyance of Land—Unexpressed Trust in Favour of Children of Grantor—Declaration by Court of Equity—Adverse Possession of Children—Limitations Act—Acts Relied on as Preventing Running of Statute—Tenancy at Will—Caretaker.

In 1894, H. conveyed his homestead farm to the plaintiff, his son-in-law and neighbour, by a deed absolute in form, and died in the following year. At this time, there lived upon the farm H.'s eldest daughter, who was deaf and dumb, and three of his other children, who were very young. After the deed, H. remained in possession of the farm until his death; and after his death the four children remained in undisturbed possession of it until the death of the eldest, shortly before this action was begun. The purpose of the action was to evict the three remaining children, the defendants, who still remained in possession. The plaintiff said that it was understood between him and H. that the eldest daughter should stay upon the farm as long as she lived:—

Held, that the deed to the plaintiff was given and taken upon a trust under which the children were to have the benefit of the property conveyed—a trust which the plaintiff had not fulfilled, and one which would be violated in giving effect to the deed in the manner sought by the plaintiff; and so the action could not succeed in this Court of Equity.

Held, also, that, if there was no trust, the plaintiff's claim was defeated by the Limitations Act.

Certain acts of the plaintiff relied upon by him as preventing the running of the statute in the defendants' favour were based upon tacit or expressed leave or were done in the interests of the defendants by the plaintiff as their brother-in-law and neighbour.

There was no evidence of a tenancy at will; and no evidence that the defendants or their father or sister were mere caretakers.

Judgment of the County Court of the County of Lincoln affirmed.

AN appeal by the plaintiff from the judgment of CAMPBELL, Judge of the County Court of Lincoln, in an action for the recovery of land, brought in that Court, and tried by the learned Judge without a jury.

The plaintiff, Charles E. May, claimed under a conveyance of the land to him, by deed executed by the owner, John Hainer, the plaintiff's father-in-law, on the 25th September, 1894.

The defendants were the children of John Hainer by his second wife, and had been in possession of the land, a farm, since the death of John Hainer in 1895.

The plaintiff's wife was one of the children of John Hainer by his first wife.

The reasons for judgment of the learned County Court Judge were in part as follows:—

I must hold that the possession of William Hainer, James Hainer, and Louisa Teasell, and that of William Hainer, under deed No. 6044, was a continuation of the possession of their

father, John Hainer, from the time of their father's death down to the present time; that the possession of the Hainer family has been shewn to have existed for a period of upwards of 45 years; Mr. Gregory says from 1872; that the possession of the Hainer children, James, William, and Louisa, has been an actual, continuous, and visible possession, adverse to that of the plaintiff, and that as against them the plaintiff has not established a title.

There will be a declaration that the plaintiff is not entitled to possession of the lands and premises mentioned in the pleadings herein. . . .

There will also be a declaration that the defendants, James Hainer, William Hainer, and Louisa Teasell, acquired a title to the said lands as against the plaintiff by actual, continuous, and visible possession thereof from the date of the death of their father, John Hainer, on the 1st October, 1895, down to the 14th May, 1913, on which date the defendants James Hainer and Louisa Teasell conveyed the said lands, by deed No. 6044, to the defendant William Hainer, and that the defendant William Hainer has been in actual, continuous, and visible possession of the said lands, under the said deed, from the 14th May, 1913, down to the date hereof, and that he is now entitled to possession of the same as against the plaintiff. . . .

The action is dismissed with costs.

September 27. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

E. D. Armour, K.C., for the appellant. The deed to the plaintiff was made as the result of a bargain between him and John Hainer, that the former was to support Hainer's daughter Almeda for her lifetime in consideration of the grant of the land. That was the true consideration for the deed: *Myles v. Noble* (1881), 1 C.L.T. Occ. N. 214. The possession of the defendants was only that they remained with their older sister Almeda, who maintained them. I rest on the bargain. If there was no bargain, then time runs against the plaintiff from the delivery of the deed. I submit that Almeda was tenant-at-will, and there were acts of entry by the plaintiff within ten years before the commencement of the action which would determine the tenancy: *Turner v. Doe d. Bennett* (1842), 9 M. & W. 643, at p. 646.

1917
MAY
v.
HAINER.

App. Div.
1917
MAY
v.
HAINER.

A. W. Marquis, for the defendants, respondents. The plaintiff is barred by the Statute of Limitations; and any acts of entry made by him were only by leave of those in possession. The deed was given to the plaintiff in trust in favour of those who had the use of the land since the deed; the plaintiff did not fulfill the trust; and the trust would be violated by giving effect to the deed in the manner asked by the plaintiff.

Armour, in reply.

October 12. MEREDITH, C.J.C.P.:—In the year 1894, John Hainer was the owner in possession of the land in question, which was and had been for a good many years his home and the home of his family; and he was then a widower for the second time, and had several children by each of his wives. Those of the first family had all grown up and left the parental home, except one daughter—Almeda—who was and had been from her birth both deaf and dumb. She is said to have been his eldest child. The children of the second family, two boys and a girl, were quite young; the oldest is said to have been about 14 years of age. The plaintiff in this action was John Hainer's son-in-law, having married one of his daughters of the first family; and he was also a "next door neighbour" of John Hainer.

In these circumstances, the plaintiff obtained from John Hainer a deed, dated the 25th September, 1894, absolute in form and with the usual covenants, of the land in question, which property was apparently all that John Hainer had, and which was, as I have said, his family homestead. The deed was not registered until the 19th October, 1895, about the time when John Hainer died.

Notwithstanding this absolute conveyance of the land to the plaintiff, John Hainer remained in possession of the land, just as if no conveyance had been made, until he died: and his daughter Almeda and the members of the second family have ever since remained and are now—except the daughter Almeda, who died a few months before this action was brought—in possession of it as the homestead of the second family and of the daughter Almeda, until she died, without any attempt on the part of the plaintiff, or of any one, to evict them or disturb such possession in any substantial manner.

In these circumstances, it seems to me to be very obvious that the deed was never intended by either party to take effect according to its tenour; that the land must have been so conveyed upon some kind of trust in favour of those who have had the use and benefit of it ever since. Therefore, if the Statute of Limitations be not a bar to the plaintiff's claim to the land, justice can be done, between the parties to this action, only when the nature of that trust is discovered and effect is given to it.

The circumstances of the case constrained the plaintiff to say, at the close of his examination-in-chief, that it was the understanding between him and "the old gentleman" that the daughter Almeda should stay there as long as she lived. It is to be regretted that neither party, at the trial, endeavoured to prove or discover just what the obvious trust actually was; but the circumstances alone afford much evidence of its purpose and nature: it was made by the father of a sorely afflicted daughter and of three young children, all that remained to him of his two wives and two families having and needing his care and help: to say that this man, little more than a year before his death, would have given all he possessed to his more prosperous neighbour and son-in-law, leaving these helpless children homeless and in penury, is to say that which no one in his sane senses should believe: to say that the trust was merely to permit the daughter "Almeda to stay there as long as she lived," is to me equally incredible: the father's purpose must have been to benefit his dependent and helpless children of his own household, not to benefit his prosperous son-in-law and let his own flesh and blood starve or live upon charity.

The case, as I, with confidence, find, was a simple one and one of not uncommon occurrence: the father left his property thus to his son-in-law and near neighbour, for the sole benefit of these helpless children, after their father's death. None of the children could manage the property, or lease or sell it. A will and probate would have been a more costly and roundabout method. What simpler or better way than to convey to a trusted neighbour and son-in-law, who could, and, in common charity and decency, should, oversee and help these children, and, if need be, lease or sell for their benefit? See *Anning v. Anning* (1916), 38 O.L.R. 277, in which some of the numerous instances of deeds of that character are mentioned.

App. Div.
1917
MAY
v.
HAINER.
Meredith,
C.J.C.P.

App. Div.

1917

MAY

v.

HAINER.

Meredith,

C.J.C.P.

I have no hesitation in reaching the conclusion that the deed in question was given and taken upon a trust under which these children were to have the benefit of the property conveyed; a trust which the plaintiff has not fulfilled; and one which would be violated in giving effect to the deed in question in the manner sought by the plaintiff in this action; and so the action cannot succeed in this Court of Equity.

I also have no doubt that, if that view of the case be discarded, the learned trial Judge was quite right in deciding against the plaintiff on the defence based upon the Statute of Limitations.

If no such trust, the plaintiff became entitled to possession of the land upon the delivery to him of the deed in question, in September, 1894; yet John Hainer remained in possession until his death just as if no deed had been made, and, as I have said, it was not even registered until about the time of his death; and since his death these children have remained in possession, in like manner, until this day: always the property has remained the homestead of the home members of the family: and more than 23 years have passed since the deed was made.

There was some testimony regarding a lack of fencing at some part of this small parcel of land; but the whole evidence makes it plain to my mind that it was all always in the possession of those who occupied the buildings in their possession, so possessed as part of the homestead, just as in their father's lifetime, and used by them when and for such purposes as they chose to use it.

It was proved at the trial that the plaintiff had daily watered his "stuff at the foot of the hill:" that he got water there for his own use and in doing so crossed over some part of the land in question: but no claim to such an easement was made in this action, and so the question of any such right cannot be considered now: and, even if this act should not be found to have been, as upon the whole evidence in this case it might well be found to have been, based upon tacit or expressed leave, as a common neighbourlike accommodation, I do not see how it could have the effect of preventing the running of the statute in the defendants' favour.

It was also proved by the plaintiff that on two occasions, one 16 or 17 years ago, and the other 7 years ago, he had sold some of the sand which the waters of the lake had washed upon a part of the land in question; and that on another occasion, about 4 or 5

years ago, he had received payment for like sand which had been taken by another person. The testimony of one of the witnesses at the trial shewed, however, that this sand was partly upon part of the land in question and partly upon an adjoining part of the plaintiff's own land. But, however this may be, and if these acts are not to be based upon the leave of the occupants of the land in question, how could they prevent the running of the statute? Counsel for the plaintiff, as I understood him, disclaimed any right in that respect, but claimed the benefit of them as revocations of an imaginary tenancy at will.

And there was some evidence of the plaintiff having put up a notice warning trespassers who had tied their horses to some of the trees on the land in question. There is some testimony indicating that this was done at the request of the daughter Almeda, as well as some that she objected to it and had the notice torn down. But, in any case, how can it displace the evidence of the defendants' possession? The parties were not strangers to one another; the plaintiff was by family ties closely connected with these helpless, in a business sense, children, and he was their near neighbour: my only surprise is that he did so little, that he did not from week to week do some act which would shew that he had an interest in the property, an interest in it through these children, arising from a natural feeling for, if not duty towards, them, a duty or feeling which I should have thought the dictates of, not even so much as charity, but even humanity, would have made plain.

But these things, as I have said, are now relied upon for the plaintiff as shewing a right of entry by him within ten years before the commencement of this action: it is put in this way: that each of these acts operated as a determination of a tenancy at will, under which those in possession held, and so gave the right of entry. That, however, would not be so if these acts are to be attributed, as I should attribute them, to the tacit, if not expressed, leave of those in possession: and, before a tenancy of any kind can be considered to have been broken, it must first be shewn to have existed; and I am quite unable to find that any kind of tenancy ever existed between the father, these children or any of them, and the plaintiff; indeed, in all the circumstances of the case, it seems to me to be as plain as anything in law can be,

App. Div.

1917

MAY

v.

HAINER.

Meredith,
C.J.C.P.

App. Div.
1917

MAY
v.
HAINER.

Meredith,
C.J.C.P.

that there never was any such tenancy. It is not possible to believe that, if this action had been brought against John Hainer in his lifetime, it could have succeeded. And, if the children were tenants at will, or if the incapacitated elder daughter was, and the others were in under her, that tenancy was determined by the first intrusion 16 or 17 years ago, and there is no kind of evidence of any renewed tenancy from time to time, not to speak of from day to day, after each act which, but for leave, would have been unlawful, unless treated as a determination of a tenancy at will. In the case relied upon by Mr. Armour, the defendant had, as an assessor, entered his own name as tenant, and that of his former landlord as landlord, of the land in question, after the landlord's act determining the first tenancy; and all that was held in that case, upon that question, was that that fact was some evidence, as an admission on the part of the defendant, that he was at that subsequent time such a tenant.

Nor is there any evidence upon which it could be found that the defendants or the daughter Almeda or their father were or was a mere caretaker or mere caretakers of the land for the plaintiff, or that that daughter Almeda was, and the other children were in only under her.

The appeal should be dismissed; and I have to add this only, that, in my opinion, the action ought never to have been brought.

RIDDELL, J.:—I had much doubt upon the hearing as to the correctness of the decision in this case: but a repeated perusal of the evidence has not convinced me that my doubts were well-founded.

I have nothing to add to the judgment of the learned County Court Judge, and would dismiss the appeal with costs.

LENNOX, J., agreed with the Chief Justice.

ROSE, J., agreed in the result.

Appeal dismissed with costs.

[APPELLATE DIVISION]

1917

Oct. 15.

DELBRIDGE V. TOWNSHIP OF BRANTFORD.

Ditches and Watercourses Act—Award of Engineer—Construction of Ditches—Lowering of Culvert—Injury to Land by Increasing Volume of Water Brought upon it—Liability of Township Corporation—Responsibility for Acts and Omissions of Engineer—Liability of Individual Land-owners for Lowering of Culvert—Wrongful Act—Continuing Wrong—Consequences since Acquisition of Land by Plaintiff—Unregistered Award—"Instrument Affecting the Land"—Registry Act, secs. 2 (d), 71—Purchaser for Value without Notice—Easement.

The effect of an award under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, is to subject the lands affected by it to an easement; and it is, therefore, an "instrument affecting the land" within the meaning of secs. 2 (d) and 71 (1) of the Registry Act, R.S.O. 1914, ch. 24.

Ross v. Hunter (1882), 7 S.C.R. 289, applied and followed.

And in this case, where an award had been made under the Ditches and Watercourses Act, and had not been registered, it was *held*, that, as against the plaintiff, who, at the time of the registration of the conveyance to him of a parcel of land which was affected by the award, had no notice of the existence of the award or of the award-drains, the award conferred no right upon the individual defendants, who, as the plaintiff complained, had lowered a certain culvert, and thereby caused more water flowing from the upper land to pass through the culvert upon his land, to bring down the surface water from their lands upon his land, or to increase the volume of the water which would naturally flow upon it, or the rapidity of its flow.

Semble, even if the award were binding on the plaintiff, there was no legal justification for the lowering of the culvert.

And *held*, that the wrong was a continuing one; and, although the acts of which the plaintiff complained were done before he became the owner of the land, these defendants were answerable to him for the consequences of the wrong to him since he became the owner.

But the defendant township corporation was not liable to the plaintiff: the lowering of the culvert was not done by it or by its authority; and it was not responsible for the making of the ditches for which the award provided.

The engineer who made the award was, in the performance of his duties, a statutory officer, and the corporation was not answerable for anything done or omitted by him in the performance of his duties under the Act.

Gray v. Town of Dundas (1886-7), 11 O.R. 317, 13 A.R. 588, and *Seymour v. Township of Maidstone* (1897), 24 A.R. 370, followed. ✓

The following statement of facts is taken from the judgment of MEREDITH, C.J.O:—

This is an appeal by the plaintiff from the judgment of the County Court of the County of Brant, dated the 26th April, 1917, which was directed to be entered after the trial of the action without a jury on the previous 31st January (whereby the action was dismissed).

The appellant brings his action to recover damages for injury done to his land by the bringing down to and discharging upon it of large quantities of water.

1917

DELBRIDGE
v.
TOWNSHIP
OF
BRANTFORD.

The appellant's land has an area of about $2\frac{2}{3}$ acres, and forms part of lot No. 38 in the 4th concession of the township of Brantford, and it was conveyed to him on the 30th April, 1913, by Martha Harriman, the then owner of it.

In the year 1908, proceedings were taken under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, at the instance of the respondent Greenwood, for the drainage of his land, which lies to the west of the land of the appellant.

The respondent Grummett and Martha Harriman, as well as other neighbouring land-owners, were duly notified of the requisition made by Greenwood, and in due course an award was made by the engineer, bearing date the 17th November, 1908.

The award provides for the making of a drain in three sections across the lands of the persons who were parties to the proceedings.

The only one of the sections which needs to be referred to is section A. According to the award it is located on the south half of lot —(sic) in the 4th concession of the township of Brantford, and “has outlet through culvert leading from Echo Place to the Grand Trunk Railway crossing said lot No. ”

This culvert is shewn on the plan marked exhibit 8, and is situate in or near the land of the appellant, and the plan shews that there is a drain, partly open and partly tiled, running north-easterly through it to the culvert.

The award provides that Martha Harriman shall make and complete that portion of section A commencing at 10 feet west of the west end of the culvert on the side-road through lot 38 to a point 14 feet westerly from stake No. 1 (70 feet) etc.

The culvert in the side-road is shewn on the plan, exhibit 8, and is a culvert crossing the side-road, which is called on the plan James street.

The award makes no provision for continuing the drain north-easterly beyond the point of commencement mentioned in it.

The culvert in the side-road was, at the time the award was made, an ordinary road-culvert, put in by the township corporation.

The drain was constructed in accordance with the provisions of the award, and the part of it which Martha Harriman was required to construct was constructed by her.

The appellant complains that the respondents Greenwood and

Grummett have lowered the culvert in the side-road, and thereby caused more water flowing from the upper land to pass through the culvert and on to his land.

There is no pretence of saying that the township corporation or its officers had anything to do with the lowering of the culvert, but it is sought to hold it liable because it suffered the culvert to be lowered.

The appellant bases his claim also on the ground that the drain constructed in 1908 was not continued to a proper outlet, but was brought down to and left at the side-road, from which the water brought down by it flowed down to and upon his land; and he also contends that, he having registered the conveyance to him from Martha Harriman, without notice of the rights conferred by the proceedings under the Ditches and Watercourses Act, his land is not affected by them.

September 17. The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., LENNOX, J., and FERGUSON, J.A.

W. S. Brewster, K.C., for the appellant. Even though, as found by the learned trial Judge, the lowering of the culvert which caused the damage was done before the appellant acquired title, the wrong was a continuing one, for the consequences of which the respondents are liable: *Stott v. North Norfolk* (1914), 16 D.L.R. 48. The wrongful acts complained of were outside of the award under the Ditches and Watercourses Act, and not justified by it: *McCrimmon v. Township of Yarmouth* (1900), 27 A.R. 636. Furthermore, the appellant was not bound by the award, inasmuch as it had not been registered. The outlet provided was insufficient, and the respondents are liable for allowing water to accumulate on the highway.

A. E. Watts, K.C., for the respondent corporation, argued that it had been improperly brought into the action, as it was not liable for the act of the engineer who made the award, he being a statutory officer acting under the Ditches and Watercourses Act. The lowering of the culvert was done not by the authority of the corporation. [MEREDITH, C.J.O., referred to *Seymour v. Township of Maidstone* (1897), 24 A.R. 370.] That case is in the respondent's favour: also *In re McLellan and Township of Chinguacousy* (1900), 27 A.R. 355, 362; *Mandley v. Township of*

1917
DELBRIDGE
v.
TOWNSHIP
OF
BRANTFORD.

App. Div.
1917
—
DELBIDGE
v.
TOWNSHIP
OF
BRANTFORD.

Monck (1909), 1 O.W.N. 271. The findings of fact by the learned trial Judge were very carefully considered, and should not be disturbed. The appellant's vendor, Martha Harriman, acquiesced in and acted under the award, and the appellant should be bound by her action.

J. Harley, K.C., for the respondent Grummett, argued that the appellant's proper course was to have appealed against the award. As to his being bound by the action of his assignor, he referred to *Dalton v. Township of Ashfield* (1899), 26 A.R. 363, 380, 381; *Murray v. Dawson* (1867), 17 U.C.C.P. 588, 592. The appellant examined the property when he bought it, and he was concluded by Martha Harriman's failure to appeal against the award.

W. M. Charlton, for the respondent Greenwood, referred to the question of *quantum* of damage, and to the judgment of Moss, J.A., in the *Dalton* case, *supra*, at p. 380, and to the judgment of Clute, J., in the *Mandley* case, *supra*.

Brewster, in reply.

October 15. The judgment of the Court was read by MEREDITH, C.J.O. (after setting out the facts as above):—It will be convenient to deal first with the last contention. The award was not registered, and it is beyond question that, if the award under the Ditches and Watercourses Act is an instrument which should have been registered in order to prevent the rights acquired under it from being lost in case of the sale of any of the land affected by the easement which it conferred, to a purchaser for value without notice, whose conveyance was registered, the appellant's land is not in his hands affected by it, for the award is, as against him, fraudulent and void: Registry Act, R.S.O. 1914, ch. 124, sec. 71.*

Then is the award an instrument affecting land within the meaning of sec. 71?

By the interpretation section of the Act (sec. 2) it is provided (d) that the word "instrument" shall include, in addition to cer-

*71.—(1) After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

tain named instruments, "every other instrument whereby land may be transferred, disposed of, charged, incumbered or affected, in any wise, affecting land in Ontario."

The effect of the award is clearly to subject the lands affected by it to an easement; and it is, therefore, in my opinion, an instrument to which sec. 71 applies.

It was unsuccessfully argued in *Ross v. Hunter* (1882), 7 S.C.R. 289, that a grant of an easement was not a deed within the meaning of the Nova Scotia statutes, Part II., title XVIII., ch. 79, sec. 19, which required that "all deeds, judgments and attachments affecting land shall be registered in the office," etc.; and, if a grant of an easement is a deed affecting land, it follows that the award which confers an easement is an instrument affecting land.

The result of this is, that, as against the appellant, who, at the time of the registration of the conveyance to him, had no notice of the existence of the award-drains or of the award, the award confers no right upon the respondents Grummett and Greenwood to bring down the surface water from their lands to and upon the appellant's land, or to increase the volume of the water which would naturally flow to and upon it, or the rapidity of its flow. They are, of course, not bound to do anything to prevent that water from taking its natural course; and if, taking that course, the water flowed upon the appellant's land to his injury, he has no recourse against them for any damage he may have sustained from that cause.

However, even if the award were binding on the appellant, there was no legal justification for the action of the respondents Grummett and Greenwood of lowering the culvert in the side-road, the effect of doing which was necessarily to cause more of the water brought down by the ditches provided by the award to flow upon the appellant's land, or to come upon it with greater velocity than it would otherwise have come, and to bring down to it more water than without the drains would have come there.

It was argued by counsel for the respondents, and effect was given by the learned Judge to the contention, that, inasmuch as the acts of which the appellant complains were done before he became the owner of his land, he cannot complain of the injurious consequences to him of them. That is an erroneous view. The wrong

App. Div.
1917

DELBRIDGE
v.

TOWNSHIP
OF

BRANTFORD.

Meredith, C.J.O.

App. Div.
1917
—
DELBIDGE
v.
TOWNSHIP
OF
BRANTFORD.
—
Meredith, C.J.O.

complained of is a continuing wrong, and for the consequences of it to the appellant, since he became the owner of his land, the respondents are answerable to him. If authority for this view be necessary, it is to be found in the case of *Ross v. Hunter*, already referred to.

The only remaining question is, whether or not the appellant has been damnified by the wrongful acts of the respondents, Grummett and Greenwood, and, if he has been, to what extent he has been injured.

The injury of which he complains is the washing away of the soil and the interference with the tilling of his land by the water, which, as he alleges, has been brought down by the drains, and lies upon it.

The evidence on this branch of the case is by no means satisfactory. There is much to lead to the conclusion that the appellant has very much exaggerated the extent of his injury, and to warrant the conclusion that it is of a comparatively trifling character.

In no case could the appellant have succeeded against the township corporation. The lowering of the culvert was not done by it or by its authority, and it is not responsible for the consequences of the making of the ditches for which the award provides. The engineer who made the award was, in the performance of his duties, a statutory officer, and the corporation is not answerable for anything done or omitted by him in the performance of his duties under the Ditches and Watercourses Act: *Gray v. Town of Dundas* (1886-7), 11 O.R. 317, 13 A.R. 588, and cases there cited; *Seymour v. Township of Maidstone*, 24 A.R. 370.

I would therefore dismiss the appeal as to the respondent corporation with costs.

The appellant is, however, entitled to recover against the other respondents, and the only other question is as to the sum at which his damages should be assessed.

The most definite and therefore reliable testimony as to the extent of the injury done to the appellant's land is that of the civil engineer and land surveyor, Roger Lee, who took measurements of the extent of the erosion, and testified that altogether 10 cubic yards of earth have been eaten out by the water.

Accepting this as an accurate statement of the extent of the

injury done by the erosion, and making what I think is a reasonable allowance for any other damage caused to the appellant's land, I would assess the damages at \$50, and direct that judgment should be entered for him against the respondents Grummett and Greenwood for that sum, with full costs on the County Court scale without set-off, and leave the judgment to stand as to the respondent corporation. The appellant should pay the costs of this respondent of the appeal, and the other respondents should pay the appellant's costs of the appeal.

It is somewhat singular that the respondents did not set up the award as a defence to the action. Although not set up as a defence, the trial proceeded as if it had been, and the judgment appealed from deals with it, and determines that it is binding on the appellant.

The pleadings should, therefore, be amended, the statements of defence of the respondents Grummett and Greenwood by setting up the award, and the appellant's pleadings by adding a reply setting up the defence of purchaser for value without notice, and sec. 71 of the Registry Act.

Appeal allowed in part.

[APPELLATE DIVISION.]

GAZEY v. TORONTO R.W. Co.

App. Div.
1917

DELBIDGE
v.
TOWNSHIP
OF
BRANTFORD.
Meredith, C.J.O.

1917

Oct. 15.

Street Railway—Injury to Passenger Alighting from Car—Invitation to Alight while Car Moving—Opening of Exit-door—Evidence—Findings of Jury—Negligence—Absence of Contributory Negligence—Duty of Appellate Court where Verdict Supported by Reasonable Evidence.

The opening of the door of a standing train or street-car, at a regular stopping place, is *prima facie* an invitation to alight; opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably careful passenger is not, without more, an invitation to alight; opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; circumstances alter cases, and each case of these kinds must depend on its own circumstances.

Review of the authorities.

The plaintiff, a passenger on a street-car of the defendants, requested the conductor to let her off at a regular stopping place; as the place was approached, the conductor signalled the motorman to stop. On arriving at the place, and when the car had, as the plaintiff thought, stopped, the motorman opened the door leading from the front vestibule to the steps of the car, intending the plaintiff to alight from the car. The car had not stopped, as found by the jury in an action for damages for the plaintiff's

1917
GAZEY
v.
TORONTO
R.W. Co.

injuries, but was moving very slowly; and the plaintiff in attempting to alight was by the movement of the car thrown to the ground and seriously injured. The jury's findings were: that there was negligence on the part of the defendants which caused the accident to the plaintiff; that the negligence was, "motorman opening front-door of car before being stopped;" and that the plaintiff could not, by the exercise of reasonable care, have avoided the accident."

Held, that it could not be said that there was no evidence to support the finding of the jury, or that the jury acted unreasonably in finding that the opening of the door was a negligent act.

If there is any reasonable evidence to support the finding of the jury, their verdict should stand; and it is not the duty of an appellate Court to be subtle and astute to find reasons for setting aside verdicts.

✓ *Commissioner for Railways v. Brown* (1887), 13 App. Cas. 133, 134, and *Toronto R.W. Co. v. King*, [1908] A.C. 260, 270, referred to.

The following statement of the facts is taken from the judgment of FERGUSON, J.A.:—

This is an appeal by the defendants from a judgment of Mr. Justice Latchford, dated the 3rd May, 1917, pronounced after the trial of the action at the Toronto jury sittings on the 2nd and 3rd May, 1917, directing judgment to be entered for the plaintiff Rebecca Gazez for the sum of \$2,000 and for her husband James Gazez for the sum of \$1,500.

The action arises out of an accident to the plaintiff Rebecca Gazez about the hour of 9.20 on the evening of the 4th February, 1916; she was a passenger on the defendants' street-car, and, being desirous of alighting at the corner of Roncesvalles avenue and High Park boulevard, requested the conductor to let her off there, and, as that corner was approached, the conductor signalled the motorman to stop. On arriving at the corner, and when the car had, as the plaintiff thought, stopped, the motorman opened the door leading from the vestibule to the steps of the car, intending the plaintiff to alight from the car. As found by the jury, the car had not stopped, so that the plaintiff in attempting to alight was by the movement of the car thrown to the ground and seriously injured.

As the plaintiff's right to succeed turns on the meaning of the finding and on whether or not there is any evidence to support the finding that the opening of the car-door was a negligent act, I propose to quote the evidence as to how the accident happened.

The plaintiff says:—

"Q. And then did you have any conversation with the conductor with regard to his stopping the car to let you off? A. I asked him to let me off at High Park boulevard.

"Q. What did he say? A. He pulled the bell.

"Q. When? A. When I asked him to let me off.

"Q. How far were you from High Park boulevard when you spoke to him? A. The stop before we came to the boulevard I asked him. After he started from that I asked him.

"Q. Will you tell the jury what happened as the car approached High Park boulevard; what did you do? A. I got up and went to the door.

"Q. Went to which door? A. The inner door.

"Q. Front or rear? A. The front-door.

"Q. And what happened then? A. The motorman opened the outer door.

"Q. That is, the door letting you into the street? A. Yes, sir.

"Q. And what was the car doing then? A. I thought it was stopped.

"Q. What did you do? A. Well, I stepped out on to the step.

"Q. And then what happened? A. They pulled the bell, and I let go, and the car gave a jerk and threw me off.

"Q. Anybody getting off at that same place except you? A. Yes, sir.

"Q. Who was it? A. Miss Ranger.

"Q. She was getting off there too? A. Yes.

"Q. What sort of door was there opening between the vestibule and the street? A. One of those that he opens with a lever.

"Q. Where were you when he opened that door? A. I was standing in the inner door.

"Q. Then you say the motorman opened the outer door, and you, thinking that the car had stopped, stepped down? A. Yes, sir.

"Q. On to the street? A. Yes, sir.

"Q. You say you heard a bell ring? A. Yes, sir.

"Q. And the car gave a jolt? A. Yes.

"Q. And you fell? A. Yes, sir.

"Q. Had you got your feet on the pavement? A. I had one foot on the pavement and one on the step, as near as I can remember.

"Q. And your impression was that the car had stopped? A. Yes, sir.

1917

GAZEY

v.

TORONTO
R.W. Co.

1917

GAZEY
v.
TORONTO
R. W. CO.

"Q. You may have been mistaken as to that? A. Well, it is hard to say.

"Q. What age are you, Mrs. Gazey? A. 56."

Defence witness, Miss Louisa Ranger, says:—

"Q. Do you remember this accident to Mrs. Gazey? A. Yes.

"Q. You were on the car at the time? A. Yes, sir.

"Q. Did you notice Mrs. Gazey get up from her seat? A. Yes.

"Q. Had the car stopped at that time? A. I thought it had.

"Q. You thought it had when she rose from her seat? A. Yes.

"Q. When did you think the car had stopped? A. Before Mrs. Gazey got off. I say I thought it had stopped when I saw Mrs. Gazey get off.

"Q. Had the car stopped when you got off? A. No, it was just a slow movement.

"Q. It was still moving? A. Yes.

"Q. It was just moving when you got off? A. Yes.

"Q. Had it stopped and started again? A. I thought it had stopped.

"Q. You say you thought it had stopped? A. Yes.

"Q. But when you got off it was still moving slowly? A. When I came to the door it was still on the move, but very slow move.

"Q. Which door do you mean? A. The front-door.

"Q. The door from the car into the vestibule? A. No, the door off the car into the road.

"Q. When you got there it was moving slowly? A. Yes, very slowly.

"Q. Mrs. Gazey had fallen at that time? A. Yes, she was lying on the ground.

"Q. When you got up to get off the car, as I understand your story, you say, so far as you knew the car had stopped? A. Yes.

"Q. Have you any reason to doubt that that is correct? A. Only, of course, the slight movement when I came to step off the car.

"Q. You believed that the car had stopped when you started to get off? A. Yes.

"Q. When you got to the steps you found that it was moving?

A. Yes.

"Q. Mrs. Gazey thinks the car was stopped too? A. Yes.

"Q. And afterwards when you got to the steps you found that the car was moving? A. Yes.

"Q. So that it must have been started up again? A. Yes.

"Q. And you say the car was still moving when you came to the step? A. Yes, because it was a slow movement."

Defendants' conductor, James Shaw, says:—

"Q. Did you see these people getting off? A. I did.

"Q. Did you ring the bell after you saw them prepared to get off? A. No, I didn't touch the bell at all.

"Q. Did you notice any jerking or jolting of the car? A. No, there was positively no jerking at all."

Defendants' motorman, George Ray, says:—

"Approaching High Park boulevard, I got a bell to stop there and I did so. When I stopped the car I opened the door to let two ladies out. The first lady got out, and the second lady was about to follow, when my attention was drawn to her standing on the top step and bending over.

"I cannot account for this lady falling, other than the road was covered with ice."

The answers of the jury are as follows:—

"1. Was the accident to the plaintiff Rebecca Jane Gazey caused by any negligence on the part of the defendants? A. Yes.

"2. If so, in what did such negligence consist? A. Owing to motorman opening front-door of car before being stopped.

"3. Could the plaintiff Rebecca Jane Gazey, by the exercise of reasonable care, have avoided the accident? A. No.

"4. If so, in what did her want of reasonable care consist? (No answer).

"5. By reason of the accident what damages were sustained, (a) by Rebecca Jane Gazey, (b) by James Gazey? A. By Rebecca J. Gazey, \$2,000; by James Gazey, \$1,500.

App. Div.
1917

GAZEY
v.

TORONTO
R.W. Co.

September 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., LENNOX, J., and FERGUSON, J.A.

D. L. McCarthy, K.C., for the appellants, referred to the fact that they had been forced on to trial in the absence of the motorman, although they had been allowed by the trial Judge to put in a statement by him. What was done by him did not amount to an invitation to the plaintiff to alight, and did not constitute negligence on his part. There is no recognised practice and no printed rules that govern the matter. He referred to *Lewis v. London Chatham and Dover R.W. Co.* (1873), L.R. 9 Q.B. 66; *London and North-Western R.W. Co. v. Hellawell* (1872), 26 L.T.R. 557, where Pigott, B., distinguishes that case from *Bridges v. North London R.W. Co.* (1871), 24 L.T.R. 835. *Edgar v. Northern R. W. Co.* (1884), 11 A.R. 452, is not applicable here. He also referred to *Mayne v. Grand Trunk R.W. Co.* (1917), 39 O.L.R. 1, 34 D.L.R. 644, now in the Supreme Court of Canada; *Paglini v. North Jersey Street R.W. Co.* (1903), 69 N.J.L.R. 60, 54 Atl. Repr. 218; *Gayle's Administrator v. Louisville and Nashville R. Co.* (1915), 173 S.W. Repr. 1113; *Murray v. Southern Pacific Co.* (1916), 236 Fed. Repr. 704; *England v. Boston and Maine Railroad* (1891), 153 Mass. 490.

I. F. Hellmuth, K.C., and *E. C. Cattnach*, for the respondents, the plaintiffs, argued that the question as to invitation was absolutely for the jury—the motorman had sole control of the movements of the car. The plaintiff was lulled into a sense of security which caused the accident. The principle of the *Edgar* case, *supra*, applies here, and the Court is not called upon to follow the American cases. They referred to *Praeger v. Bristol and Exeter R.W. Co.* (1871), 24 L.T.R. 105, as the leading English authority; and to the judgments of Riddell and Lennox, JJ., in the *Mayne* case, *supra*.

McCarthy, in reply, argued that the question as to whether the circumstances of the case proved that there was an invitation to alight, was a legal one, and not for the jury. The *Praeger* case is distinguishable.

October 15. The judgment of the Court was read by FERGUSON, J.A. (after setting out the facts as above):—Counsel for the appellants argued that the authorities had established

the proposition that the opening of a car-door of a moving railway-train or street-car is not in itself an invitation to alight, and is not negligence; and that, because the jury have in the answer to the second question said that the negligence of the defendants consisted "in the motorman opening the front-door of the car before being stopped," judgment must on these authorities be entered for the defendants. I have looked at all the authorities cited and some others.

In *Praeger v. Bristol and Exeter R.W. Co.*, 24 L.T.R. 105, the train was stopped at the station, but the car in which the plaintiff rode was not drawn up to the platform. Cockburn, C.J., at p. 108, says: "He," the plaintiff, "got out on the invitation of the guard, who opened the door, which implied an invitation to alight, and I think also to alight with safety."

In *Bridges v. North London R.W. Co.*, 24 L.T.R. 835, it was held that it is not the calling of the station, but the stopping of the train at the station, that is the invitation to the passenger to alight, for passengers have then a right to expect that they can alight without danger at the proper place for alighting.

In *London and North-Western R.W. Co. v. Hellowell*, 26 L.T.R. 557, Martin, B., at p. 558, says: "On the train arriving at the Huddersfield station several porters ran to the train before it stopped and unlocked and threw open the doors of several carriages, and, amongst others, the carriage in which the female plaintiff was sitting, and called out 'All out for Huddersfield;' and she, supposing that the train had come to a stand, began to get out of the carriage. She had got her foot on the step for getting out of the carriage when the brake which had been applied to stop the train was suddenly taken off, which caused an increase of speed, and she then fell on the platform, and received certain injuries. Now those are the facts, and I cannot entertain a doubt that they constitute a case of negligence against the company. In the first place, the porter opens the door. That is a question for the jury, as to what was intended by that. Then the porters call out, 'All out for Huddersfield.' Some people may have thought that that was an order for the passengers to get out; whilst certainly others may only have taken it as an intimation of the station at which the train had arrived. Then the carriage was nearly at a standstill, but the brake being taken

App. Div.
1917

GAZEY
v.
TORONTO
R.W. Co.

Ferguson, J.A.

App. Div.
1917

GAZEY
v.

TORONTO
R.W. Co.

Ferguson, J.A.

off, the train went on with an increase of speed. How can all this be said not to be evidence of negligence? In my judgment it is a very clear case."

In *Cockle v. London and South Eastern R.W. Co.* (1872), L.R. 7 C.P. 321, it was held that the bringing of a railway carriage to a standstill at a place at which it was unsafe to alight and where the danger was not apparent, coupled with the opening of the door by the guard, was an invitation to alight and was negligence.

In *Lewis v. London Chatham and Dover R.W. Co.*, L.R. 9 Q.B. 66, the name of the station was called out, but the railway train before stopping overshot the platform. The plaintiff, knowing the station and that the train was not stopped at its proper place, endeavoured, before the train had stopped for an appreciable length of time, to alight, and, as she was in the act of alighting, the train backed and threw her down. In dismissing the action, Blackburn, J., at p. 71, says: "From all the circumstances she, as a reasonable person, must have believed that the train, which had passed the platform, would come back again. . . . She had no business to get out at the place she did unless the company's servants told her to do so." Quain, J., says, at p. 72: "The company had done no act to induce her" (the plaintiff) "to believe that the train had arrived at a place where it would stop, so as to justify her in assuming that the company had given her an invitation to alight at that particular spot."

In *Edgar v. Northern R.W. Co.*, 11 A.R. 452, it was by the Court of Appeal for Ontario held that the calling out of the station, coupled with the slowing up of the train (not the stopping) at the station, was some evidence of an invitation to alight, and that it was for the jury to say whether the plaintiff acted in a reasonable, careful, and prudent manner in availing herself of it.

In *Keith v. Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116, it was by the Court of Appeal for Ontario held that whether or not the plaintiff had acted reasonably in alighting from a moving train (the train had stopped at the station, but had started again before the plaintiff had time to alight), was a question of fact for the jury.

In *Mayne v. Grand Trunk R.W. Co.*, 39 O.L.R. 1, 34 D.L.R.

644, the prevailing opinion in a divided Divisional Court was, that it was a question of fact for the jury as to whether or not the passenger had, in the light of all the circumstances adduced in evidence, exercised due care, or whether or not he had in the conductor's words and acts justification for the belief that the train had come to a stop at his station and that he was invited to get off when and where he did.

There are a number of United States authorities which discuss and deal with the calling out of the station, the slowing up or stopping of the train at a stopping place, and the opening of the car-door, as being or affording evidence of an invitation to alight and of negligence.

England v. Boston and Maine Railroad, 153 Mass. 490, a decision of an appellate Court, is a case of the brakesman opening and fastening back the door of the car and calling out the name of the station; the Court said that these acts were not an invitation to alight from the moving train, but were an invitation to alight from the train when it had stopped; and that the plaintiff was guilty of contributory negligence in attempting to alight from the moving train even if she believed that the train had stopped, *provided* the mistaken belief was due to her own omission to use reasonable care.

Mearns v. Central R.R. Co. of New Jersey (1900), 163 N.Y. 108, is a decision of the Court of Appeals of the State of New York (reversing a decision in the Appellate Division of that State, reported, 23 App. Div. 298), holding that the calling out of the name of the station and the opening of the car's vestibule-door were not in themselves sufficient, in the circumstances of that case, to constitute an invitation to alight from a moving train; but, notwithstanding their conclusion in that particular case, the Court in giving judgment laid down or approved of the following proposition (p. 111): "It is . . . the general rule of law . . . that the boarding or alighting from a moving train is presumably and generally a negligent act *per se*, and that in order to rebut the presumption and justify a recovery for an injury sustained in getting on or off a moving train, it must appear that the passenger was, by the act of the defendant, put to an election between alternative dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of

App. Div.
1917

GAZEY
v.

TORONTO
R.W. Co.

Ferguson, J.A.

App. Div.
1917

GAZEY
v.

TORONTO
R.W. Co.

Ferguson, J.A.

the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety." This proposition would, I think, include a situation which would create a belief that the train had stopped. In the Appellate Division (New York) it was thought that it was a question for the jury as to whether or not the plaintiff had, in the light of the attending circumstances, exercised due care, or whether or not he had, in consequence of the conductor's words and acts, full warrant for the belief that the train had come to a full stop, and that he had acted upon a justifiable sense of security caused by these words and acts. This case resembles the *Mayne* case, and the view there adopted by the Ontario Court seems to agree with the view of the Appellate Division (New York) rather than with the result arrived at in the Court of Appeals of New York.

In *Paglini v. North Jersey Street R.W. Co.*, 69 N.J. L.R. 60, it was, by a bench of four Judges of New Jersey, held that it was not negligent *per se* for a motorman to open the gate on the front of a trolley before the car had come to a full stop. That was on application for a new trial for misdirection, and turned entirely on the question whether or not the opening of the car-door was, without more, an invitation to alight from a car that was obviously moving; or, as put in the judgment (p. 62): "Because a motorman opens a gate before a car comes to a stop, that will not excuse a person in jumping off a car before it comes to a stop."

In *Gayle's Administrator v. Louisville and Nashville R. Co.*, 173 S.W. Repr. 1113, a decision of the Kentucky Court of Appeals, it was held that the announcing of the station and the opening of the vestibule is not an invitation to a passenger to alight before the train stops, and is not negligence. There were no special attendant circumstances.

In *Murray v. Southern Pacific Co.*, 236 Fed. Repr. 704, a decision of the Circuit Court of Appeals of California, it was held that the opening of the gate and trap-door of a railway train, while the train was still in motion, did not justify the plaintiff in alighting from the train while it was in motion, and that he was guilty of contributory negligence if he knew the train was in motion or by the use of ordinary care should have known.

See also an article in 2 Canadian Railway Cases, p. 37, under the title "Passenger Alighting."

From a perusal of these authorities, I think that it is established that the opening of the door of a standing train or street-car, at a regular stopping place, is *prima facie* an invitation to alight, but that opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably careful passenger is not, without more, an invitation to alight; that opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; that circumstances alter cases, and that each case of these kinds must depend on its own circumstances. It seems to me that the question in the case at bar is not: "Is the opening of the door of a moving car in itself negligence or an invitation to alight?" but: "Was it, in the circumstances of the case, an invitation to alight or part of the evidence or chain of circumstances going to make up an invitation?" Was it the link in the chain of particular circumstances of the case going to make up a complete invitation to alight, by inducing the plaintiff to believe that the car was stopped at the proper and regular stopping place, and that she intended to alight and might do so safely, or was it the act that should have been left undone so as to prevent the plaintiff from acting on the erroneous impression created by the acts and circumstances which immediately preceded it?

The accident was preceded by a request to the conductor to let the plaintiff off at High Park boulevard, a signal by the conductor for a stop at High Park boulevard, a slowing down of the car as it approached High Park boulevard, the reaching of the proper stopping place, the apparent stopping of the car, the getting up and walking of the plaintiff to the exit from the car to the vestibule, opening by the motorman of the door, as he says, for the purpose of letting the ladies out. The plaintiff and Miss Ranger say that they thought that the car had actually stopped; it was in fact moving so slowly that the movement was not readily noticeable; the jury have concluded that, under the circumstances, the plaintiff acted reasonably, carefully, and with ordinary prudence in stepping off the car at the place where and when she did, and that, the car having arrived at the stopping place, and the plaintiff having, to the knowledge of the motor-

App. Div.
1917

GAZEY

v.

TORONTO
R.W. Co.

Ferguson, J.A.

App. Div.
1917

GAZEY
v.

TORONTO
R.W. Co.

Ferguson, J.A.

man, come to the door for the purpose of alighting there, it was negligent of the motorman to open the door of the car when the car was moving so slowly as probably to deceive the plaintiff into the belief that it was actually stopped, and by his very act of opening the door strengthening that belief and creating in the plaintiff's mind a belief that she should alight and might do so with safety.

These, I think, are not questions of law, but questions of fact for the jury. If so, can we say that there is no evidence to support the finding of the jury, or that the jury acted unreasonably in finding that the opening of the door was a negligent act? I take it to be well settled that, if there is any reasonable evidence to support the finding of the jury, their verdict should stand, and I do not conceive it to be the duty of an appellate Court to be subtle and astute to find reasons for setting aside verdicts. See *Commissioner for Railways v. Brown* (1887), 13 App. Cas. 133, at p. 134; *Toronto R.W. Co. v. King*, [1908] A.C. 260, at p. 270.

I am of the opinion that there was sufficient evidence to support the finding of the jury, and the finding, when read in the light of the circumstances adduced in evidence, supports the judgment, and I would dismiss the appeal with costs.

Appeal dismissed with costs.

1917

Oct. 15.

[APPELLATE DIVISION.]

CONKLIN v. DICKSON.

Landlord and Tenant—Lease of House—Injury to Premises by Acts and Omissions of Tenant—Liability in Damages—Negligence.

Where the defendant, the tenant of the plaintiff's house, knew that damage from frost was likely to happen if precaution were not taken to prevent the water which he had brought into the house by pipes from freezing, and failed to take reasonable precaution to that end, but, on the contrary, did that which increased the danger and led to the freezing of the water and consequent injury to the demised premises, he was held liable to the landlord in damages for such injury.

This liability was not based upon negligence; but *semble*, if it were necessary to prove negligence, it had been proved.

The proposition stated in Wood's *Landlord and Tenant*, 2nd ed., para. 422, approved.

Sticklehorne v. Hatchman (1586), Owen 43, *Holden v. Liverpool New Gas Co.* (1846), 3 C.B. 1, 5, and *Steggles v. New River Co.* (1863), 11 W.R. 234, applied.

The following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant from the judgment of the County Court of the County of Lambton, dated the 15th June, 1917, which was directed to be entered for the plaintiff, after the trial of the action before the Judge of that Court, sitting without a jury.

The appellant was the tenant of the respondent of a frame dwelling-house in Sarnia. The tenancy was a monthly one, and there was no written lease. There was no furnace in the house. The water was brought into the basement by a three-quarter inch pipe and carried by a pipe leading from that pipe to the bath-room on the second storey. In the bath-room there was an instantaneous heater which was heated by natural gas. In the bath-room were also a thirty-gallon water-tank or boiler, a water-closet, and a wash-basin. The water in the tank could be drained off by means of a tap in the bottom of it, provided for that purpose. This heater was the only appliance for heating the house with which the building was provided, but the appellant had a stove in the kitchen and a gas-heater in the dining-room, both of them on the ground-floor. The house was provided with storm-doors for every outer door, and there was a storm-window for the north bed-room window.

The night of the 3rd February, 1917, was very cold, but beyond this there is no evidence as to the temperature, and that night the water in the tank or boiler and in the water-closet froze, with the result that both of them were damaged, and that the water which escaped, owing to the bursting of the tank and the injury to the water-closet, damaged the papering and the plastering in the rooms below the bath-room.

All this damage was caused, as the Judge has found, by the action of the appellant in discontinuing the fires in the kitchen and dining-room, shutting off the gas from the heater in the bath-room, and turning off the water in the basement, without draining off the water in the pipes and in the heater and water-closet, the result of which was, that the water ceased to flow, and therefore was in a condition that made it more than likely that it would freeze. Had the appellant drawn off the water from the tank or boiler by means of the tap with which it was provided for that

1917

CONKLIN
vs. D.
DICKSON.

1917
CONKLIN
v.
DICKSON.

purpose, it would have lessened the danger from the action of the frost, though it would probably not have entirely obviated it. In addition to this, the danger of the water freezing was increased by the failure of the appellant to put up the storm-doors and storm-window.

October 2. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

D. L. McCarthy, K.C., for the appellant, argued that the only question was, whether he had taken all reasonable precautions in order to prevent injury by frost, and the evidence shewed that he had done so. He referred to an article by Mr. C. B. Labatt on the obligation of a tenant to repair, 37 C.L.J. 521, at p. 531, and to Foa's Landlord and Tenant, 5th ed., pp. 151, 152.

A. Weir, for the plaintiff, the respondent, argued that the judgment of the learned trial Judge was correct in law, and was supported by the evidence. He referred to Halsbury's Law of England, vol. 18, paras. 978, 981, 982.

McCarthy in reply.

October 15. The judgment of the Court was read by MEREDITH, C.J.O. (after setting out the facts as above):—In effect the finding of the learned Judge is, that the injuries of which the respondent complains were the direct result of the acts of the appellants to which reference has been made, and the finding is also that the appellant was guilty of gross negligence in acting as he did.

The findings of the learned Judge are, in my opinion, warranted by the evidence, and entitle the respondent to recover, apart altogether from the finding of gross negligence. The water which froze was brought into the house by the appellant, and the tank or boiler was filled with water by his act; it was his act which shut off the gas from the heater and left the water standing in the tank after the heat had been withdrawn, and that was the cause of the water in the pipes no longer moving in them and ultimately freezing, and I see no reason why the appellant should not answer in damages for the injury which those acts and omissions have caused. He brought upon the premises something which, owing to the weather conditions, was likely to cause damage, unless

proper precautions were taken to prevent it. Proper precautions were not taken; but, on the contrary, conditions which were most likely to aggravate the danger from the frost were created by the appellant, by his shutting off the water and the heat, and his failure to draw off the water from the receptacles in which it was and from which it would not run off by gravitation, and, to some extent, probably, by his neglect to put up the storm-doors and storm-window.

It was urged that the appellant in what he did was honestly endeavouring to guard against damage by frost, and that, though he made the mistake of doing what, in the conditions which existed, was calculated to aggravate the danger he was seeking to guard against, he is not liable for the consequences of his acts. I am unable to agree with that contention, and I may point out that the appellant, if he did not know what he ought to have done, ought to have taken steps to find out. The weather had been extremely cold for some time before the night when the injury occurred, and it was evidently present to the mind of the appellant that in such weather it was necessary to take means to prevent the water from freezing. The evidence leads to the conclusion that, if he had not shut off the gas, the freezing in the bath-room would not have taken place, and I cannot help thinking that it was a negligent act to shut off the water and leave it standing in the tank or boiler and in the water-closet, and that, if it were necessary to prove negligence, that negligence has been proved; but I prefer to rest my judgment on the grounds I have stated.

The case is somewhat analogous to that where an explosion of gas takes place owing to neglect to turn off the gas by means of stop-cocks provided for that purpose. In Wood's Landlord and Tenant, 2nd ed., para. 422, it is said that: "Every tenant of a house is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury."

No authority is given for this proposition, but it is supported by what was said by Cresswell, J., in nonsuiting the plaintiff in

App. Div.
1917

CONKLIN
v.

DICKSON.

Meredith, C.J.O.

App. Div.
1917

CONKLIN
v.

DICKSON.

Meredith, C.J.O.

Holden v. Liverpool New Gas Co. (1846), 3 C.B. 1, 5, and it is, I think, a correct statement of the law.

Another case which seems to have some bearing on this is *Sticklehorne v. Hatchman* (1586), Owen 43, the note of which is: "Adjudged by the Court, that if for not scouring of a ditch or mote the groundsells of a house are putrified, or trees cut downe which are in defence of the house, whereby the house by tempests is blown downe, waste shall be assigned *in domibus pro non scourando*, etc."

Another case which has some bearing on the question before us is *Steggles v. New River Co.* (1863), 11 W.R. 234, in which it was held that where it appeared that it was known to the defendant that the effects of frost might be to cause the plugs in the highway to start, and that some precaution might be taken to prevent the water from escaping into the soil, there was evidence for the jury that the escape of water which caused injury to the plaintiff, which was occasioned by the starting of a plug caused by the frost, was due to the negligence of the defendant, and a rule to set aside a verdict which had been found for the plaintiff was discharged.

In the case at bar, the appellant evidently knew that damage from the frost was likely to happen if precaution were not taken to prevent the water from freezing, and he failed to take reasonable precaution to that end, but, on the contrary, did that which increased the danger and which undoubtedly led to the freezing of the water and the consequent injury to the premises of which the respondent complains.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1917

Oct. 15.

BUCKLEY v. VAIR.

*Interest—Discretion of Court below—Appeal—Costs—Appeal “as to Costs only”
—Judicature Act, sec. 24—County Courts Act, sec. 32—Appeal Joined with
Unsuccessful Appeal as to another Matter.*

The discretion exercised by a lower Court in allowing interest upon a money-demand ought not to be interfered with on appeal.

Toronto R.W. Co. v. Toronto Corporation, [1906] A.C. 117, followed.

An appellant cannot, by joining with an appeal as to costs, an appeal as to other parts of the judgment, in which he fails, escape from the effect of sec. 24 of the Judicature Act, R.S.O. 1914, ch. 56, which section is, by sec. 32 of the County Courts Act, R.S.O. 1914, ch. 59, applicable to County and District Courts, and by which an order “as to costs only which by law are left to the discretion of the Court” cannot be appealed against except by leave of the Court or Judge making the order. ✓

AN appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Grey, in favour of the plaintiff, in an action in that Court, brought to recover a sum of money alleged to be due to the plaintiff as commission on the sale of land.

The appeal was on two grounds: (1) that interest on the plaintiff's claim was improperly allowed; (2) that the County Court Judge erred in awarding the costs of the action to the plaintiff.

October 4. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

M. Wilkins, for the appellant, argued that \$21 had been improperly allowed for interest, and that the learned trial Judge had erred in allowing costs to the plaintiff. He referred to the Judicature Act, sec. 35 (2), and to Rule 316. Reference was also made to *Mendels v. Gibson* (1904), 7 O.L.R. 611.

W. Lawr, for the plaintiff, the respondent, referred to sec. 34 of the Judicature Act and to Rule 768. He cited *Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117.

October 15. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 9th June, 1917, of the County Court of the County of Grey, which was directed to be entered by the Senior Judge after the trial before him, sitting without a jury, on the previous day.

App. Div.
1917

BUCKLEY
v.
VAIR.

Meredith, C.J.O.

The appeal is rested on the grounds: (1) that interest on the respondent's claim was improperly allowed; (2) that the learned Judge erred in awarding the costs of the action to the respondent.

The discretion exercised by the learned Judge in allowing the interest ought not to be interfered with: the case of *Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117, is conclusive against the appellant on this branch of the appeal.

The appeal as to costs is, therefore, an appeal as to costs only, within the meaning of sec. 24* of the Judicature Act, R.S.O. 1914, ch. 56, which section, by the provisions of sec. 32† of the County Courts Act, R.S.O. 1914, ch. 59, is applicable to County and District Courts, and does not lie without the leave of the Judge, which has not been obtained.

An appellant cannot, by joining with an appeal as to costs, an appeal as to other parts of the judgment, in which he fails, escape from the effect of these provisions: *Harpham v. Shacklock* (1881), 19 Ch.D. 207, 215; *Llanover v. Homfray* (1881), 19 Ch.D. 224, 231, 232; *Bew v. Bew*, [1899] 2 Ch. 467, 472.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

*24. No order of the High Court Division or of a Judge thereof made with the consent of parties shall be subject to appeal, and no order of the High Court Division or of a Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to appeal on the ground that the discretion was wrongly exercised, or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the Court or Judge making the order.

† 32. Subject to the provisions of the Judicature Act and to Rules of Court, the practice and procedure of the Supreme Court shall apply to the County and District Courts.

[IN CHAMBERS.]

1917

Oct. 17.

SUPERIOR COPPER CO. LIMITED V. PERRY.

Writ of Summons—Foreign Defendants—Service of Notice of Writ out of Ontario—Action for Declaration of Right to Make Calls on Company-shares—Rule 25 (1) (h)—Assets in Ontario—"Good Cause of Action upon a Contract"—Conditional Appearance.

An action for a declaration that certain shares of the stock of the plaintiff company (incorporated in Ontario) standing in the names of the defendants, who resided out of Ontario, were not fully paid-up and were assessable and subject to call, was *held* to be an action based upon the contract existing between the shareholders and the company.

It was shewn that the defendants had assets in Ontario of the value of \$200; and *held*, that the plaintiffs had "a good cause of action against the defendants upon a contract," within the meaning of Rule 25 (1) (h).

Therefore, an application to set aside the service upon the defendants out of Ontario of a notice of the writ of summons was dismissed; but, as there was some doubt, the defendants were allowed to enter a conditional appearance. ✓

AN appeal by the defendants from an order of the Master in Chambers, noted 13 O.W.N. 71, dismissing the defendants' application to set aside the service of a notice of a writ of summons upon the defendants out of Ontario.

October 13. The appeal was heard by CLUTE, J., in Chambers' *M. L. Gordon*, for the defendants.

A. W. Langmuir, for the plaintiffs.

October 17. CLUTE, J.:—The plaintiffs' claim is for a declaration that the shares of the stock of the plaintiff company standing in the names of the defendants and of each of them are not fully paid-up and are assessable and subject to call.

The company was incorporated in Ontario with its head-office in the Province. The defendants reside in the State of Michigan.

The plaintiffs' material shews that the defendants have assets in Ontario to the value of \$200 at least; and that is not denied by the defendants.

It was argued that this case does not fall within Rule 25 (1) (h),*

* 25.—(1) Service out of Ontario of a writ of summons or notice of writ may be allowed wherever:—

(h) Service may also be allowed where the action is for any other matter and it appears that the plaintiff has a good cause of action against the defendant upon a contract or judgment . . . and that the defendant has assets in Ontario, of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment; but the order allowing service shall in such case provide that in case the plaintiff should recover judgment if the plaintiff does not appear, the plaintiff shall prove his claim, in such a manner as may be deemed proper.

Clute, J.

1917

SUPERIOR
COPPER
Co.
LIMITED
v.
PERRY.

because the plaintiffs did not shew that they had a good cause of action against the defendants upon contract. It is said that the shares were issued as paid-up shares. This is denied, and at the request of the shareholders, or the greater part of the shareholders, an Act was passed by the Ontario Legislature in 1907, 7 Edw. VII. ch. 117, sec. 1, as follows: "It is hereby declared that the shares of the stock issued by the Superior Copper Company Limited, upon which less than par value has been paid to the company, are subject to call and assessable."

It is further alleged that the shares in question came into the defendants' hands subsequent to this Act. The defendant Sutton is the assignee and trustee in bankruptcy of the defendant Perry, and, as said by counsel, after bankruptcy the shares held by the defendant Perry, which passed to the defendant Sutton as assignee in bankruptcy, were surrendered and a new issue of shares made to the defendant Sutton.

It does not appear to me that these, or other facts disclosed, affect the main question, which is, whether or not it appears that the plaintiffs have a good cause of action against the defendants on a contract.

It was argued that no relief was asked upon the contract, but simply a declaration which did not come within clause (h). I do not think so. The action is, it appears to me, based upon the contract existing between the shareholders and the company. It is by virtue of the shares held that the shareholders have certain rights and interests in the company in respect of the shares. But it is, as I think, nevertheless, a subject-matter arising out of a contract, and the action is brought upon this contract, not because of any existing need for ultimate relief, but for a declaration in respect to a certain right claimed.

The following cases were referred to: *Colonial Bank v. Cady and Williams* (1890), 15 App. Cas. 267; *Hughes v. Oxenham*, [1913] 1 Ch. 254; *Kolchmann v. Meurice*, [1903] 1 K.B. 534; *Re Canada Cork Co.*, not reported, but referred to in *Parker's Company Law*, p. 390; *Lopez v. Chavarri*, [1901] W.N. 115; *Annual Practice* (1916), p. 82; *Cooper v. Knight* (1901), 17 Times L.R. 299; *Hoerter v. Hanover Caoutchouc Gutta Percha and Rubber Works* (1893), 10 Times L.R. 104; *Kemerer v. Watterson* (1910), 20 O.L.R. 451.

While I take the view that the service should stand, I think there is sufficient doubt to entitle the defendants to have leave to enter a conditional appearance, and the order below should be so varied.

Costs in the cause.

[An appeal by the plaintiff from the above order was heard by the Second Divisional Court of the Appellate Division on the 4th December, 1917. Judgment was reserved.]

Clute, J.

1917

SUPERIOR
COPPER
Co.
LIMITED
v.
PERRY.

[IN CHAMBERS.]

REX V. WARNE DRUG CO. LIMITED.

1917

Oct. 17.

Ontario Temperance Act—Magistrate's Conviction of Druggist for Keeping Intoxicating Liquor for Sale without License—6 Geo. V. ch. 50, sec. 40—Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. ch. 56—Powers of Provincial Legislature—Separate Fields of Legislation—License to Carry on Trade in Canada—Medicated Compound Containing Large Percentage of Proof Spirits—Use as Beverage—Evidence—Findings of Magistrate—Secs. 85, 88, 124, 125, 129, 131 of Temperance Act—Motion to Quash Conviction—Preliminary Objection—Right of Appeal under sec. 92 (2)—Right to Certiorari Taken away—Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10 (3).

The Ontario Temperance Act, 6 Geo. V. ch. 50, and the Proprietary or Patent Medicine Act of Canada, 7 & 8 Edw. VII. ch. 56, do not enter upon the same field of legislation. The "pith and marrow" of the Dominion Act is to prescribe, with respect to the sale of patent medicines, certain conditions and limitations for the protection of the public; and it does not purport to confer upon the licensee any special authority to carry on trade throughout Canada.

The Dominion statute 7 & 8 Geo. V. ch. 30, sec. 2, adding sec. 4D to the Act 6 & 7 Geo. V. ch. 19, and *Rex v. Azler* (1917), 40 O.L.R. 304, referred to.

The defendant company carried on business as a chemist and druggist, and was also licensed under the Dominion Act above mentioned. For exposing or keeping for sale intoxicating liquor without first having obtained a license under the Ontario Temperance Act, contrary to sec. 40, the defendant company was convicted by a magistrate. The "liquor" was an "invalid port wine," which contained 35.22 per cent. of proof spirits. There was evidence before the magistrate of the use of the wine as a beverage:—

Held, that the defendant company was not authorised by the Dominion Act to carry on the sale of this article throughout Canada in contravention of provincial prohibitory legislation.

Held, also, that, there being evidence before the magistrate from which he could draw the inference that the wine did not contain "sufficient medication to prevent its use as an alcoholic beverage" (sec. 129 of the Ontario Temperance Act, as amended by 7 Geo. V. ch. 50, sec. 44), his finding could not be interfered with upon a motion to quash the conviction.

Held, also, that, while the magistrate might well have found that sec. 131 of the Ontario Temperance Act, as amended by 7 Geo. V. ch. 50, sec. 46, applied to the defendant company's case, yet, having regard to secs. 85 and 88—and the evidence not having satisfied the magistrate that the defendant company could not with reasonable diligence have obtained knowledge of the fact that secs. 124 and 125 had not been complied with—the magistrate's finding could not be interfered with upon a motion to quash the conviction.

Rex v. Le Clair (1917), 39 O.L.R. 436, followed.

1917
 REX
 v.
 WARNE
 DRUG
 CO.
 LIMITED.

Held, also, that a preliminary objection raised on behalf of the magistrate—that under sec. 92 (2) of the Ontario Temperance Act an appeal from the conviction lay to a County Court Judge, and that sec. 10 (3) of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, applied so as to preclude the defendant company from moving as upon *certiorari* to quash the conviction—was fatal to the application.

Rex v. St. Pierre (1902), 4 O.L.R. 76, *Rex v. Cook* (1908), 18 O.L.R. 415, *Rex v. Renaud* (1909), 18 O.L.R. 420, 423, *Rex v. Cantin* (1917), 39 O.L.R. 20, 22, and *Rex v. Chappus* (1917), 39 O.L.R. 329, 331, followed.

MOTION to quash a conviction of the defendant company, by the Police Magistrate for the City of Peterborough, for an offence against the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 40.

October 2. The motion was heard by MASTEN, J., in Chambers. *R. T. Harding* and *G. N. Gordon*, for the defendant company. *J. R. Cartwright*, K.C., for the Crown and the magistrate.

October 17. MASTEN, J.:—This was a motion to quash a conviction made under the Ontario Temperance Act. The conviction complained of was made by D. W. Dumble, Esq., Police Magistrate for the City of Peterborough, on the 10th day of September, 1917, “for that the said Warne Drug Company Limited, at the city of Peterborough, in the county of Peterborough, on Wednesday the 15th day of August, 1917, did expose or keep for sale liquor without first having obtained a license under the Ontario Temperance Act, authorising them so to do, contrary to section 40 of the said Act.”

The admissions and evidence shew that the drug company is a corporation carrying on business as a duly qualified druggist and chemist in the city of Peterborough, and also that it was duly licensed under the Proprietary or Patent Medicine Act of Canada, 7 & 8 Edw. VII. ch. 56; that the defendant keeps and exposes for sale a liquid compound known as “Wilson’s Invalid Port Wine,” sold by the Lawrence A. Wilson Company Limited, of Montreal. The certificate on the bottle produced, which is exhibit A, seems to indicate that the compound is manufactured and prepared by Lyman Sons & Company, chemists, but the evidence is not definite on that point. It further appears from the evidence that this compound contains 35.22 per cent. of proof spirits; also that the certificate of the Government analyst, forming part of the label or wrapper, is true. That certificate reads as follows:—

“I hereby certify that I have analysed ‘Wilson’s Invalids’ Port Wine,’ and find it contains the best of natural port wine and

extract of cinchona bark as its chief principles. These active principles are blended in the proper proportion to act as an excellent appetizer, and a most agreeable tonic and fortifier."

On the 11th day of August last, one William Copperthwaite bought from the defendant company a bottle of this wine and took it directly to a stable, where he and another man drank about one-half of the bottle. Copperthwaite says in his evidence, among other things: "I could not say that I liked it; my friend did not to my knowledge have a cough" (witness had said that he bought it for a cough); "I cannot say what my friend took it for; I have not seen him since. I got drunk; I do not know if my friend got drunk. We left the bottle there; it was unpleasant to the taste, but that did not prevent us drinking it. I went from the stable to the street, and there I was arrested for being drunk. I tasted the medicine in the wine; I would not use that stuff for ordinary drinking purposes." There is other evidence of the use of the wine as a beverage.

For the defence it was proved that the compound in question is a proprietary patent medicine, registered as such under the Dominion Act as No. 53; that the defendant company bought it from a wholesale drug-house, in the original packages in which it was sold; that the defendant company had sold it for 15 years as a tonic; that Wilson, the proprietor of the trade mark, is a Montreal man doing a large liquor business in that city; that more of the wine had been sold during the last year than formerly; that this applies to all patent medicines; that the defendant company would not sell to any one who would use it as a beverage if it knew it.

The first point raised in support of the application is, that, under the Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. ch. 56, the defendant is authorised to carry on the sale of this article throughout Canada, and that it is *ultra vires* of the Ontario Legislature to interfere with or obstruct the authority so derived from the superior federal source. I am of opinion, upon the best consideration that I can give to the matter, that the Ontario Temperance Act and the Proprietary or Patent Medicine Act do not enter upon the same field of legislation. The "pith and marrow" of the Proprietary or Patent Medicine Act is to prescribe, with respect to the sale of patent medicines, certain conditions and limitations for the protection of the public; and it

Masten, J.

1917

REX

v.

WARNE
DRUG
Co.
LIMITED.

Masten, J.
1917
REX
v.
WARNE
DRUG
Co.
LIMITED.

does not purport to confer upon the licensee any special authority to carry on trade throughout Canada. This view is supported by the legislation enacted by the Federal authorities at the session just closed, 7 & 8 Geo. V. ch. 30, sec. 2, adding sec. 4D to the "Act in aid of Provincial Legislation prohibiting or restricting the sale or use of Intoxicating Liquors," 1916, 6 & 7 Geo. V. ch. 19, whereby it is provided that any penalty under the Dominion statute shall be in addition to any penalty under any Provincial law, and that the provisions of the Dominion statute shall not be deemed in any way to affect any Provincial law. The view which I have expressed as above is also in accordance with the recent decision of my brother Middleton in the case of *Rex v. Axler* (1917), *ante* 304. This objection is overruled.

The next point raised in support of the application to quash is based on secs. 125 and 129 of the Ontario Temperance Act. Section 125 provides that "nothing in this Act shall prevent the sale (a) by a druggist of (i) any . . . medicated spirit containing alcohol prepared according to a formula of the British Pharmacopœia or other recognised standard work on pharmacy, or (ii) medicine or other similar officinal or pharmaceutical compound or preparation, or . . . (iv) for purely medicinal purposes, any mixture so prepared containing alcohol and other drugs or medicine; . . . by reason only that the same contain alcohol, but this shall only apply to any such compound, mixture and preparation as contains sufficient medication to prevent its use as an alcoholic beverage."

Section 129, as amended in 1917 (by 7 Geo. V. ch. 50, sec. 44), provides: "Nothing in this Act shall apply to or prevent the sale by a druggist of any drug or medicine for strictly medicinal purposes, notwithstanding the mixture with such drug or medicine of liquor as one of the necessary and *bonâ fide* ingredients thereof, if such mixture contains sufficient medication to prevent its use as an alcoholic beverage."

It is contended on behalf of the applicant company that the compound in question does contain sufficient medication to prevent its use as an alcoholic beverage, and that the mere fact that some persons with perverted mind or taste choose to drink it does not negative this view.

I am satisfied, upon the evidence which was adduced in this case, that the compound in question is capable of being used as a

beverage, and has actually been used as such on various occasions and by different people. Even if my own view were different upon this point, there was certainly evidence before the Police Magistrate from which he might draw the inference that this compound was not sufficiently medicated to prevent its use as a beverage. It therefore becomes a question of fact, in respect of which I am unable to interfere, on this motion, with the conclusions reached by the Police Magistrate.

The next point upon which the applicant company relies is based on sec. 131; that section, as amended by the Act of 1917, sec. 46, reads as follows: "If a druggist is charged with a contravention of any of the provisions of sections 124 and 125 of this Act, but proves that he sold the compound, mixture or preparation in question in the same state as when he purchased it and that he could not with reasonable diligence have obtained knowledge of the fact that the provisions of that section had not been complied with he shall not be found guilty." In the present case the principal officer of the defendant company swears that he had no knowledge of the fact that the provisions of these sections had not been complied with, and in fact that he had believed and still believed that the compound was sufficiently medicated to prevent its use as a beverage. It is not controverted that he sold the compound in the same state as when he purchased it.

Upon the whole testimony, I think that the magistrate might well have found that this section did apply; but, having regard to secs. 85 and 88, and having regard further to the fact that the evidence tendered has not satisfied the magistrate that the defendant company could not with reasonable diligence have obtained knowledge of the fact that the provisions of secs. 124 and 125 had not been complied with, I am unable, on a motion to quash a conviction, to interfere: *Rex v. Le Clair* (1917), 39 O.L.R. 436. It need scarcely be pointed out that, on an appeal under sec. 92 of the Act, different considerations would apply, and the correctness of the findings of the magistrate on the evidence adduced could be reviewed.

On the argument of this motion, a preliminary objection was raised on behalf of the magistrate, namely, that under sec. 92, sub-sec. 2, of the Ontario Temperance Act, an appeal lies to the Judge of the County or District Court of the county or district in which the conviction is made, sitting in Chambers without a

Masten, J.

1917

REX

v.

WARNE
DRUG
CO.
LIMITED.

Masten, J.

1917

REX

v.

WARNE

DRUG

Co.

LIMITED.

jury; and that sec. 10, sub-sec. 3, of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, applies under these circumstances so as to preclude the defendant company from making a motion for a *certiorari* to quash the conviction.

I was at first of opinion that the preliminary objection was invalid, for the following reasons:—

Sub-section 3 of sec. 10 is as follows: "No *such order or conviction* shall be removed into the Supreme Court by writ of *certiorari* or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy."

The subject-matter of the prohibition contained in sub-sec. 3 is confined to "such order or conviction" as is referred to in sub-secs. 1 and 2 of sec. 10. Where a conviction does not adjudge imprisonment, sub-sec. 1 provides an appeal to the Division Court of the division in which the cause of the information or complaint arose, and sub-sec. 2 provides the like appeal in certain other cases. It therefore appears that the only appeal provided by sec. 10 is to the Division Court of the division in which the cause of the information or complaint arose. Under sec. 92, sub-sec 2, of the Ontario Temperance Act, the appeal prescribed is to the Judge of the County or District Court sitting in Chambers, and the Act also contains special provisions with respect to the conduct of such appeals. I therefore thought that the prohibition contained in sub-sec. 3 of sec. 10 of the Summary Convictions Act had no application to the appeal given in this case by sec. 92 of the Ontario Temperance Act.

On further consideration, I have reached the conclusion that the cases of *Rex v. St. Pierre* (1902), 4 O.L.R. 76, *Rex v. Cook* (1908), 18 O.L.R. 415, *Rex v. Renaud* (1909), 18 O.L.R. 420, at p. 423, *Rex v. Cantin* (1917), 39 O.L.R. 20, at p. 22, and *Rex v. Chappus* (1917), 39 O.L.R. 329, 331, preclude me from giving effect to the view so formed, notwithstanding the fact that the point to which I have adverted does not appear to have been raised or considered.

The preliminary objection is therefore maintained, and the motion is refused with costs, on that ground as well as on the merits.

[APPELLATE DIVISION.]

1917

Oct. 22.

SHAW v. HOSSACK.

Interest—Promissory Notes—"Money-lenders"—Harsh and Unconscionable Transactions—Ontario Money-Lenders Act—Findings of Trial Judge—Reversal on Appeal.

The judgment of CLUTE, J., 39 O.L.R. 440, was reversed on the ground that the plaintiffs were not money-lenders within the meaning of the Ontario Money-Lenders Act, R.S.O. 1914, ch. 175, and that the transactions were not harsh and unconscionable.

McCabe v. Jeffrey (1917), reported in the foot-note, *infra*, followed.

AN appeal by the plaintiffs from the judgment of CLUTE, J., 39 O.L.R. 440.

October 22. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

A. A. Macdonald and W. J. McCallum, for the appellants, argued that they had never held themselves out as money-lenders. The case was on all fours with *McCabe v. Jeffrey* (September 28, 1917, decision of the Second Divisional Court, unreported). The Ontario Money-Lenders Act, R.S.O. 1914, ch. 175, sec. 2 (e), defines "money-lender." He must be a person who "carries on" that business. This was not the case here: Halsbury's Laws of England, vol. 21, p. 44; Am. & Eng. Encyc. of Law, 2nd ed., vol. 5, p. 72; *Rex v. Morgan* (1913), 11 D.L.R. 794. There was nothing harsh or unconscionable in the transactions: *Poncione v. Higgins* (1904), 21 Times L.R. 11.

J. M. Ferguson, for the defendant D. C. Hossack, and D. J. Coffey, for the defendant L. E. Hossack, respondents, supported the judgment, saying that the plaintiffs had taken advantage of the defendants' necessities to drive a hard bargain, and that the transactions were harsh and unconscionable. The plaintiffs were money-lenders, upon the evidence: *Bellamy v. Timbers* (1914), 31 O.L.R. 613, at p. 620, 19 D.L.R. 488; *Victorian Daylesford Syndicate Limited v. Dott*, [1905] 2 Ch. 624; *Whiteman v. Sadler*, [1910] A.C. 514. On the question of the meaning of "harsh and unconscionable" reference was made to *Wilton & Co. v. Osborn*, [1901] 2 K.B. 110; Halsbury's Laws of England, vol. 21, p. 53, para. 104, note (p), and p. 54, note (q).

Macdonald, in reply.

App. Div.
1917

SHAW
v.
HOSSACK.

Meredith,
C.J.C.P.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—If the judgment pronounced, recently, in this Court in the case of *McCabe v. Jeffrey*,* were right, the judgment in this case is wrong, and this appeal

*McCABE v. JEFFREY

Two actions were brought by Alexander McCabe against John McNee Jeffrey.

In the first action, by his statement of claim, delivered on the 19th February, 1917, the plaintiff alleged as follows:—

(2) By transfer of charge bearing date the 30th November, 1914, and registered on the 4th December, 1914, as No. 104580, the defendant transferred and assigned to the plaintiff a certain charge or mortgage, dated the 31st July, 1913, from one Brown to the defendant, in consideration of \$1,000.

(3) The said indenture of charge contained a proviso that the plaintiff would, upon payment to him of \$1,000 on the 30th November, 1915, with interest thereon as therein mentioned, re-transfer the charge to the defendant.

(4) By an agreement in writing of the 30th November, 1915, between the plaintiff and defendant, signed, sealed, and delivered by the defendant, the defendant covenanted that he would, on or before the 30th November, 1916, pay to the plaintiff the sum of \$1,000 with interest thereon at the rate of 8 per cent. per annum from the 30th July, 1915.

(5) The said agreement further contained a covenant on the part of the defendant that, if default were made in payment of the said moneys by the defendant to the plaintiff on or before the last-mentioned date, the defendant would release to the plaintiff all his (the defendant's) right, title, and interest in and to the charge referred to in para. (2).

(6) The plaintiff had always been ready and willing to perform the said agreement; and, upon default made by the defendant in payment of the said moneys, in pursuance of the agreement, the plaintiff asked the defendant to perform his part of the agreement, by executing an absolute transfer of the charge, free from any apparent claim of him (the defendant), but the defendant had neglected and refused and still neglected and refused to do so.

And the plaintiff claimed specific performance of the agreement, etc.

The defendant, by his statement of defence:—

(1) Admitted paras. 1, 3, 4, and 5 of the statement of claim, but denied all the other allegations of the plaintiff.

(2) Alleged that the plaintiff was a money-lender, not registered under the provisions of the Ontario Money-Lenders Act, R.S.O. 1914, ch. 175, and that the loan thereafter mentioned was illegal, by virtue of sec. 11.

(3) The consideration mentioned in para. 2 of the statement of claim was erroneous: the consideration for the conditional transfer of the charge therein referred to was \$800 (less legal fees and commission), which the plaintiff lent to the defendant; the sum of \$1,000 mentioned therein as the amount required to redeem the mortgage included \$200 by way of interest on the said loan for one year.

(4) Between the 30th November, 1914, and the 30th November, 1915, the plaintiff received on account of the said mortgage the sum of \$269.10.

(5) The plaintiff by duress caused the defendant to enter into the agreement referred to in para. 4 of the statement of claim, which agreement was harsh and unconscionable; and, in view of principal and interest charged and of the amount already received by the plaintiff, the cost of the loan was excessive, and the terms thereof were oppressive, harsh, and unconscionable.

(6) The plaintiff neglected and refused to furnish the defendant with any statement of moneys received by him in connection with the said transaction; the defendant believed, however, that the plaintiff had received since the 30th November, 1915, the further sum of \$50, which, added to the sum of \$269.10, would amount to \$319.10.

The defendant prayed:—

(1) That pursuant to sec. 4 of the Ontario Money-Lenders Act, the Court would reopen the transaction and take an account between

should be allowed. Each case, such as these, must be determined mainly upon its own facts; and so a judgment in one may not be authoritatively binding in another: but in this case the circumstances seem to me to be as strong against the defendant as they were in that case, and in some respects perhaps stronger.

App. Div.

1917

SHAW

v.

HOSSACK.

Meredith,
C.J.C.P.

the plaintiff and the defendant, and, pursuant to clause (d) of that section set aside wholly the agreement referred to in para. 4 of the statement of claim; and, subject to the payment to the plaintiff of the amount found due to him, if any amount should be so found, set aside the conditional transfer of charge mentioned and declare such charge vested in the defendant.

(2) In the alternative, that the plaintiff be declared a money-lender, and that the loan be declared illegal and void, and the said charge vested in the defendant.

The second action, begun on the 16th March, 1917, was brought to recover \$1,425, principal and interest alleged to be due by the defendant under an agreement contained in a transfer of charge dated the 12th May, 1915, from the defendant to the plaintiff, whereby the defendant covenanted to pay the plaintiff \$1,250 one year from the 1st May, 1915, with interest at 8 per cent. per annum.

The defences set up were the same as or similar to those in the first action.

June 6 and 8, 1917. The actions were tried together by LATCHFORD, J. without a jury, at Toronto.

R. T. Harding, for the plaintiff.

H. D. Gamble, K.C., and *A. C. McNaughton*, for the defendant.

June 8. LATCHFORD, J. (after hearing argument):—The plaintiff is not a person whose business is that of money-lending. Then he is not a person who carries on the business of money-lending in connection with any other business. He is a retired merchant, who bought property in the city of Toronto, as a result of the sale of his business in Grand Valley, in the county of Wellington. He had some moneys then at his disposal, after having invested in real estate in the city. In answer to an advertisement he lent money to the defendant. He lent money on several other occasions. What he did, does not, in my opinion, constitute him a money-lender. The business of money-lending is carried on distinct from other businesses at times, and at other times carried on in connection with other businesses. In neither aspect presented by the definition is the plaintiff a money-lender. I had occasion to consider recently who is and who is not a money-lender, and my conclusions were as stated now.

I think cases like this really present very little difficulty. The defendant had two charges on certain properties in the northern part of the city, where the land is under the Land Titles Act. These charges are similar to mortgages, and similarly dealt with. The charges which the defendant owned were second charges or mortgages upon the property. Such charges have at times considerable value, at times very little value. Their value depends on a great many factors; on the value, first of all, of the property, on the amount of the first mortgage, on the saleability of the property, and on other factors not necessary to mention. The defendant, requiring money, sought the intervention of an agent, Christie, who is said to procure loans for people. He made an offer in writing to Christie, stating the amount he was willing to pay, or rather the bonus he was willing to allow if a certain amount, \$800, was lent him upon the charge. After much difficulty, Christie got in touch with the plaintiff by means of an advertisement, and procured the advance which the defendant desired. It was, it may be said, excessive that a bonus of \$200 should be stated in the agreement to be payable by the defendant to the plaintiff in consideration of the advance of \$800, but the case was one of risk and of supply and

App. Div.

1917

SHAW

v.

HOSSACK.

Meredith,
C.J.C.P.

There was no greater reason for finding that the plaintiff in this case was a "money-lender" than there was in the other case: nor for finding that the rate of interest agreed to be paid was excessive and the transaction harsh and unconscionable, if the learned trial Judge meant so to find, although he has not said so. And the male defendant is a man who, having regard to

demand. There was difficulty in negotiating such a doubtful security as the defendant had for sale. He did not pay \$200. He agreed to pay it. He has not paid it yet. He has paid but very little upon the agreement. When money became payable under the terms of the agreement originally entered into, the defendant was not in a position to pay it. The plaintiff was pressing for his money. The defendant then made another agreement, and the loan was extended for a year. That year has expired, and the loan has not been paid. The plaintiff now comes into Court and says: "I ask the assistance of the Court to compel the defendant to do what he contracted to do—what he contracted to do with full knowledge of all the circumstances, what he contracted to do because he could not make a better bargain with any one else." I think the plaintiff is entitled to have that bargain enforced. There is nothing unconscionable about it. The bonus may be considered large, but the security, despite all that has been said, depended on so many factors that it was not a good security. I think that the defendant should be ordered by this Court to perform the agreement which he undertook to perform; he so undertook with full knowledge of all the circumstances, and without any duress, such as is alleged, on the part of the plaintiff. He should, however, have some avenue left open to him to escape from the possible consequences of being compelled to carry out his agreement. I therefore direct that, if he does not execute an absolute assignment as agreed within one month from this date, or pay such amount as is due under his agreement—that amount to be fixed by a reference if the parties cannot agree in computing it—the declaration of this Court shall be and is that the property be absolutely vested in the plaintiff. The plaintiff is also entitled to his costs of suit.

Then in regard to the other case, what I have said applies in large part. The circumstances were but slightly different. Here, as in the other case, the defendant knew what he was doing. He was negotiating a security of doubtful value for the best price he could get for it. It may or may not have any value; it is impossible to say. The property has been offered for sale and has not been sold, and the result may be that the plaintiff will lose altogether the amount he advanced. There will be judgment in the second case for the amount claimed, \$1,425, less a credit of \$95, or \$1,330, with interest from the 1st February, 1917, and costs of suit.

The defendant appealed from the judgment of LATCHFORD, J., in the two actions.

September 28. The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

H. D. Gamble, K.C., and A. C. McNaughton, for the appellant.

R. T. Harding, for the plaintiff, respondent.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—We are all of opinion that the learned trial Judge reached a right decision in each of these cases. No fault can be found with his findings that, upon the whole evidence adduced, the plaintiff failed to establish his allegations that the defendant was a "money-lender" subject to the provisions of the Money-Lenders enactments, or either of them. Like many others in various walks in life—farmers, merchants, gentlemen, and judges, for example—the plaintiff invested and lent such surplus moneys as he had, without the assistance of any solicitor or experienced money-lender.

his various professions and experiences, must have been well able to protect his own and his co-defendant's interests in all things, as well as in procuring these loans upon the best terms, for them, that were obtainable.

The appeal is allowed; and the plaintiffs are to have judgment upon their claims according to the terms of the contracts in question.

Appeal allowed with costs and judgment to be entered for the plaintiffs with costs.

Such transactions are generally few and far between, and such as, in this Province, no one would think of calling a business. To require all such persons to be registered under the Money-Lenders enactments would be straining their provisions to that which I am sure would very generally be considered an absurd extent: and one quite needless for the prevention of the mischief at which the enactments were aimed, a mischief not widespread in this Province, and indeed seldom observable except perhaps in its larger cities: see *Litchfield v. Dreyfus*, [1906] 1 K.B. 584.

Nor was any such evidence adduced upon which we can well reverse his findings, against the defendant, upon his allegations that "the cost of the loan was excessive and that the transaction was harsh and unconscionable." The terms of the loan were in no sense forced upon the defendant by the plaintiff, nor even suggested by him: and the parties were fully "at arms' length," indeed entirely strangers to one another. The terms were offered by the defendant to any taker; and were offered by him through an experienced broker or agent, who sought a lender by public advertisement. It is not suggested that better terms could have been had from any one else; on the contrary, the acts of the defendant and his broker shew that they could not. Indeed there is no evidence upon which it could be well found that "the cost of the loan was excessive" or that "the transaction was harsh and unconscionable;" and both must exist to bring the case within the Ontario enactment: see *Carringtons Limited v. Smith*, [1906] 1 K.B. 79.

A discount, or interest at the rate, of 25 per cent. may or may not be an excessive cost of a loan; it all depends upon the circumstances of the case; and a fair test generally is: could it have been procured for less? The circumstances of this case disprove, rather than prove, the defendant's allegation in this respect. A glance over some of the later cases decided in the Courts of England shews that where the plaintiff succeeded on this ground the Court allowed from 15 per cent. to 30 per cent. as a fair rate: see *Wolfe v. Lowther* (1915), 31 Times L.R. 354.

The appeal is dismissed.

Appeals dismissed with costs.

App. Div.

1917

SHAW
v.

HOSSACK.

Meredith,
C.J.C.P.

1917

[LATCHFORD, J.]

Oct. 22.

ELECTRICAL DEVELOPMENT CO. OF ONTARIO LIMITED v. COMMISSIONERS FOR QUEEN VICTORIA NIAGARA FALLS PARK.

Pleading—Statement of Claim—Motion to Strike out, as Disclosing no Reasonable Cause of Action—Rule 124—Prayer for Declaratory Judgment—Judicature Act, sec. 16 (b)—Question of General Importance—Rule 145—Defective Pleading—Rule 138—Direction to Deliver Better Pleading.

An action is not open to objection on the ground that a merely declaratory judgment is sought: Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (b).

Rule 124 (English Order XXV., r. 1) is not intended to apply to any pleading which raises a question of general importance or a serious question of law. *Dyson v. Attorney-General*, [1911] 1 K.B. 410, [1912] 1 Ch. 158, followed.

The summary procedure under Rule 124 can be adopted only when it can be clearly seen that the claim is, on the face of it, clearly unsustainable.

Attorney-General v. London and North Western R.W. Co., [1892] 3 Ch. 274, 277, and *Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited*, [1899] 1 Q.B. 86, followed.

Rule 145 requires that a statement of claim shall state specifically the relief claimed; and, where a declaration is claimed, the pleading should also state what action or contention on the part of the defendants has made it necessary to ask for a specific declaration. That "doubts have arisen" is not a sufficient reason for asking the Court to make a declaration.

In this case, where the plaintiffs, by their statement of claim, asked for a declaration as to the "present legal effect" of a certain agreement and of a statute confirming it, in relation to the right of the plaintiffs to take water from the Niagara River for the purpose of generating electricity, it was held, that the pleading, though defective, should not be struck out; and an order was made, under Rule 138, for the delivery of a further and better statement of the nature of the claim.

AN application by the defendants, under Rule 124,* for an order striking out the statement of claim and dismissing the action, on the ground that the statement of claim disclosed no reasonable cause of action, and that the action was frivolous and vexatious.

October 15. The motion was heard by LATCHFORD, J., in the Weekly Court at Toronto.

G. H. Kilmer, K.C., for the defendants.

D. L. McCarthy, K.C., for the plaintiffs.

October 22. LATCHFORD, J.:—The pleading in question sets forth that the plaintiffs and defendants are the parties referred

* 124. A Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shewn to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

to by the same names in the Ontario statute 5 Edw. VII. ch. 12*; that they constructed certain works, and have for years generated electricity, under the provisions of the agreement, in accordance with plans approved by the defendants; that doubts have arisen with respect to the quantity of water the plaintiffs may use, the amount of electricity they may develop, and the type of machinery they may install; and that such approval renders the plaintiffs' works proper works to develop the power which they are entitled to generate.

The plaintiffs then say, para. 6, that they "therefore desire this Honourable Court to declare, having regard to the words contained in the said agreement, 'license irrevocable to take from the waters of the Niagara River within the park a sufficient quantity of water to develop 125,000 electrical or pneumatic or other horse-power for commercial use:'—

"(a) What is the present legal effect of the said agreement and statute, and more particularly what is the amount of water which the plaintiffs are entitled to take from the Niagara River.

"(b) What type of machinery the plaintiffs are entitled to use in developing electric power from the water so taken. .

"(c) What is the amount of electrical power which the plaintiffs are entitled to develop."

The action is not open to objection on the ground that a merely declaratory judgment is sought: Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (b).

In England it was recently held that Order XXV., r. 4, which is identical with our Ontario Rule 124, was never intended to apply to any pleading which raises a question of general importance or a serious question of law: *Dyson v. Attorney-General*, [1911] 1 K.B. 410, [1912] 1 Ch. 158.

The summary procedure under Order XXV., r. 4, can be adopted only when it can be clearly seen that the claim is, on the face of it, absolutely unsustainable: Lindley, L.J., in *Attorney-General v. London and North Western R.W. Co.*, [1892] 3 Ch. 274, at p. 277.

This limitation upon the application of the Rule is reiterated in *Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited*,

Latchford, J.

1917

ELECTRICAL
DEVELOP-
MENT
CO. OF
ONTARIO
LIMITED
v.
COMMISSIONERS
FOR
QUEEN
VICTORIA
NIAGARA
FALLS PARK.

* An Act passed to confirm an agreement between the defendants and certain persons who assigned to the plaintiffs.

Latchford, J.

1917

ELECTRICAL
DEVELOP-
MENT
CO. OF
ONTARIO
LIMITED
v.
COMMIS-
SIONERS
FOR
QUEEN
VICTORIA
NIAGARA
FALLS PARK.

[1899] 1 Q.B. 86, though in that case—a libel action—an order discharging an order of a Master striking out the statement of claim was reversed, and judgment directed to be entered for the defendants. The ground of the decision is, that, allowing all the allegations in the statement of claim to be true, they plainly constituted no cause of action.

I think it cannot be said that the pleading now attacked discloses no ground for the declaration sought. It lacks the definiteness characteristic of the statements of claim in the *Dyson* case and in *Gingell Son & Foskett Limited v. Stepney Borough Council*, [1906] 2 K.B. 468, at p. 471. Rule 145 requires that a statement of claim shall state specifically the relief—in this case, the declaration—claimed. Such a pleading should also state, I venture to think, what action or contention on the part of the defendants has made it necessary to ask for a specific declaration. That “doubts have arisen” is not, in my opinion, a sufficient reason for the appeal made to the Court. The defendants, according to counsel for the plaintiffs, have advanced beyond the state of doubt. They are said to contend that the plaintiffs have no right to the use, even temporarily, of a greater quantity of water than is necessary to develop 125,000 h.p. The plaintiffs, on the other hand, say that, upon occasion, daily perhaps, or whenever a “peak” demand for power has to be met, they may exceed for the time being the maximum stated, so long as they utilise in a daily or weekly period no more water than is required to develop an average not greater than 125,000 horse-power.

The issue is of much importance to the plaintiffs and to the Province as represented by the defendants.

While the pleading is, in my view, defective, it should not for that reason be struck out. Rule 138* warrants my making an order that a further and better statement of claim be filed. The pleading in the *Dyson* case may well be followed as a model.

Order accordingly. Costs in the cause.

* 133. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading or special endorsement, may in all cases be ordered,

[MASTEN, J.]

1917

[LATCHFORD, J.]

Oct. 3, 24.

UPPER CANADA COLLEGE V. CITY OF TORONTO.

Injunction—Interim Order Obtained by Plaintiff—Undertaking as to Damages—Dismissal of Action without Costs—Application by Defendant for Inquiry as to and Payment of Damages—Forum—Discretion—Refusal—Special Circumstances.

An application for an order directing an inquiry as to and payment of the damages occasioned to the defendant by reason of an interim injunction obtained by the plaintiff upon the usual undertaking as to damages, and dissolved by the judgment in the action, should be made to the trial Judge. *Smith v. Day* (1882), 21 Ch.D. 421, 427, and *Gault v. Murray* (1892), 21 O.R. 458, applied and followed.

Such an application is in the discretion of the Judge.

In this case—where the chief point at issue was, whether or not the plaintiffs were liable to assessment and taxation for local improvements—the good faith of the plaintiffs, their duty as trustees to assert what they conceived to be their rights, the importance of the issue as to assessment (involving, as it did, the right of the defendants, a city corporation, to pass the by-law under which they acted), the arbitrary, though legal, conduct of the defendants in laying out the work to the manifest disadvantage of the plaintiffs, and the equally manifest benefit of interested property-owners on the opposite side of the street, and the fact that the dismissal of the action was without costs, were held to be circumstances which warranted the conclusion that, if the defendants had suffered damages by reason of the injunction, they were not such damages as the plaintiffs ought to pay; and the defendants' application for an order for an inquiry and payment was dismissed with costs.

Review of the authorities.

MOTION by the defendants for an order directing a reference to ascertain what damages, if any, they had sustained by reason of an interim injunction granted in this action on the 30th September, 1915, upon the usual undertaking of the plaintiffs as to damages, and for payment by the plaintiffs to the defendants, forthwith after such inquiry, of such damages as the plaintiffs should be found to have suffered by reason of the injunction.

October 3. The motion was heard by MASTEN, J., in the Weekly Court at Toronto.

Irving S. Fairty, for the defendants.

Frank Arnoldi, K.C., for the plaintiffs.

October 3. MASTEN, J., observed that, having considered the practice on such applications, and having considered the authorities, he had arrived at the conclusion that there was a well-settled practice that such an application should be made to the

Masten, J.

1917

UPPER
CANADA
COLLEGEv.
CITY OF
TORONTO.

trial Judge, and that the function of disposing of it appertained to him alone.

The learned Judge referred to the remarks of Lord Justice Brett in *Smith v. Day* (1882), 21 Ch.D. 421, at p. 427: "Again, I am strongly of opinion that the question whether an inquiry as to damages should be granted is within the discretion of the Judge who originally tries the case, and that his discretion ought not lightly to be interfered with." The same view, though not in such precise terms, is expressed by Jessel, M.R., in the same case.

The learned Judge referred also to *Gault v. Murray* (1892), 21 O.R. 458, and to the judgment delivered in that case by the late Chancellor Boyd, where he assumes throughout the case that the granting of such damages is a matter in the discretion of the trial Judge, and that the discretion so vested in him should not be lightly disturbed.

For these reasons, the appeal should be enlarged before the Chief Justice of the King's Bench, who was the trial Judge.

The application was then brought before FALCONBRIDGE, C.J.K.B., who declined to hear it, for the reason mentioned below, but requested LATCHFORD, J., to hear it.

October 17. The motion was heard accordingly by LATCHFORD, J., in the Weekly Court at Toronto.

Irving S. Fairty, for the defendants.

Frank Arnoldi, K.C., for the plaintiffs.

October 24. LATCHFORD, J.:—Application for an order directing a reference to ascertain what damages, if any, the defendants have sustained by reason of an interim injunction granted herein on the 30th September, 1915, and for an order that the plaintiffs do pay, forthwith after such inquiry, such damages as the defendants may be found to have suffered by reason of the injunction.

The matter comes before me by request of the trial Judge, my Lord the Chief Justice of the King's Bench, who, since the trial of the action, has become *ex officio*, as President of the High Court Division, one of the Governors of Upper Canada College. His judgment, dismissing the action without costs, was affirmed by

the Appellate Division, *Upper Canada College v. City of Toronto* (1916), 37 O.L.R. 665, and, upon further appeal, by the Supreme Court of Canada (decision not yet reported).

While the chief point at issue was, whether or not the plaintiffs are liable to assessment and taxation for local improvements, and the point was pressed at and prior to the trial, it appeared that, after the defendants had decided that the width of Oriole road along the eastern boundary of the plaintiffs' property was to be 67 feet, and had notified the plaintiffs of their decision, they yielded to the importunity of an influential owner of property on the east side of Oriole road, and determined to provide that the width of the road should be 86 feet. Not having the right to expropriate the plaintiffs' lands, while held for the purposes of the college, the city adopted a plan for the improvement of Oriole road which gave the property-owners on the east side, greatly to their advantage, a boulevard of 18 feet in front of their shallow lots, while making no provision for such a boulevard on the west side in front of the plaintiffs' lands. The result was that the sidewalk on the west side immediately adjoined the plaintiffs' property, and the street was laid out asymmetrically, to the prejudice undoubtedly of Upper Canada College. The plaintiffs protested, but without avail, and work was begun upon the street in execution of the plan. The plaintiffs, a few days later, applied for and obtained an interim injunction, which was afterwards continued to the trial. It contained the undertaking upon which the present application is based.

The right of the defendants to lay out the street as they pleased, without regard to the extent to which the plaintiffs were thereby prejudiced and other property-owners benefited, appears to have been conceded, or, if not conceded, established, at the trial.

The Municipal Act places no restriction on the manner in which a municipality may lay out a highway: R.S.O. 1914, ch. 192, sec. 472. As the defendants' action was within their powers it was not open to the Court to determine whether or not they acted impartially. The fact that costs were withheld from the successful party is significant, although the stated grounds for such dismissal appear at first to detract from the conclusion ordinarily to be drawn from that fact. The reasons for judgment (of

Latchford, J.

1917

UPPER
CANADA
COLLEGE
v.
CITY OF
TORONTO.

Latchford, J.

1917

UPPER
CANADA
COLLEGEv.
CITY OF
TORONTO.

Falconbridge, C.J.K.B., 37 O.L.R. at p. 666) state that "the parties are public bodies—both trustees—and each (no doubt in good faith) asserting rights which it believes from its own individual point of view to be just." As applied to the defendants, this eulogistic statement means, in my opinion, nothing more than that they had the rights which they were declared to have by the judgment, and that they believed these rights to be just, and acted in good faith in asserting them. Whether they exercised their rights—*just*, because warranted by statute—in the fair and equitable manner which should characterise all the actions of municipal authorities, is left undetermined by the judgment. I am therefore free to form any conclusion warranted by the evidence before me as to whether the defendants, by reason of the interim injunction, "sustained any damage *which the plaintiffs ought to pay.*"

The matter obviously imports a discretion. "There may be cases," says Turner, L.J., in *Newby v. Harrison* (1861), 3 DeG. F. & J. 287, at p. 290, "in which the Court will not consider it just to enforce an undertaking" (as to damages, as here) "though the jurisdiction to do so exists." The Court there, however, granted an order of reference.

In *Bingley v. Marshall* (1863), 9 L.T.R. 144, Wood, V.-C., upon a motion for an order of reference as to damages, said: "Where there was a *probabilis causa litigandi* it would not be fair to put a plaintiff to any additional expense on account of an undertaking of this sort; that there was such a probable cause in this case, the Court had shewn to be its opinion by giving no costs against the plaintiff."

In *Smith v. Day*, 21 Ch. D. 421, the history and meaning of such an undertaking as was given in this case are discussed by Jessel, M.R. His opinion that the undertaking applies only where the plaintiff has acted improperly in obtaining the injunction was not adopted by his associates, Brett and Cotton, L.JJ. The latter, indeed, dissented from it, stating, however, p. 430, that "damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice."

The same eminent Judge in *Griffith v. Blake* (1884), 27 Ch. D. 474, at p. 477, says that the *dictum* of Jessel, M.R., is not well-

founded, and states the true rule to be, "that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary."

The good faith of the plaintiffs, their duty as trustees to assert what they conceived to be their rights; the importance of the issue as to assessment (involving, as it did, the right of the defendants to pass the by-law under which they acted); the arbitrary, though legal, conduct of the defendants in laying out the work to the manifest disadvantage of the plaintiffs, and the equally manifest benefit of interested property-owners on the opposite side of the street; the fact that the dismissal of the action was without costs—all these are circumstances which warrant me in reaching the conclusion that, if the defendants have suffered damages by reason of the injunction, they are not such damages as the plaintiffs ought to pay.

I therefore dismiss the motion with costs.

[The defendants desired to appeal from the decision of LATCHFORD, J., but did not launch their appeal in time. A motion on their behalf for an order extending the time for appealing was dismissed by the First Divisional Court of the Appellate Division on the 10th December, 1917.]

[CLUTE, J.]

SPARKS V. CLEMENT.

Latchford, J.

1917

UPPER
CANADA
COLLEGE
v.
CITY OF
TORONTO.

1917

Oct. 25.

Vendor and Purchaser—Agreement for Sale of Land—Memorandum Signed by Purchaser only—Action by Vendor for Specific Performance—Description of Land—Uncertainty—Statute of Frauds—Parol Evidence to Identify Parcel Sold—Inadmissibility.

The plaintiff alleged that he sold to the defendant the east half of his (the plaintiff's) farm of 100 acres, and, asking for specific performance, offered as evidence of an agreement a memorandum in writing, signed by the defendant only, as follows: "A. E. S. sells and J. C. buys the 50 acres of land across the road from him for the sum of \$4,000 cash:"—

Held, that the writing did not identify the 50 acres sold sufficiently to satisfy the Statute of Frauds, and parol evidence as to which 50 acres was intended was inadmissible.

According to the evidence, the parties did not go upon the farm, and the particular 50 acres was not pointed out and that served to distinguish this case from many authorities—such as *Plant v. Bourne*, [1897] 2 Ch. 281—in which the material facts were ascertained or could be ascertained, by plan or definite location or measurement, or the fact that the parties had gone over the property and identified it in the course of the negotiations, so that the subject-matter could be made certain.

Held, also, that the case was not, in its circumstances, one in which specific performance should be adjudged.

1917
SPARKS
v.
CLEMENT.

AN action by the vendor for specific performance of an alleged agreement for the sale and purchase of land.

October 4. The action was tried by CLUTE, J., without a jury, at Ottawa.

O. A. Sauvé, for the plaintiff.

D. Danis, for the defendant.

October 25. CLUTE, J.:—The plaintiff's action is for specific performance. The document relied on is as follows:—

“Vars, March 30, 1917.

“A. E. Sparks sells and J. Clement buys the 50 acres of land across the road from him for the sum of \$4,000 cash.

“Joseph Clement.”

The plaintiff did not sign the document. The defendant is the owner of 100 acres in the 6th concession of the township of Russell, in the county of Russell. There is a road allowance between the 5th and 6th concessions, and the plaintiff owns the 100 acres across the road-allowance and directly east of the defendant's land.

The plaintiff alleges in the statement of claim that he sold to the defendant the east half of his 100 acres, and offers in evidence the above agreement and oral evidence to identify which 50 acres was intended. The defendant's house, it is said, is about the middle of his 100 acres, and it will be observed that the land mentioned in the agreement is described as the 50 acres of land across the road from him, that is, from the defendant. It will be seen that any one of three 50-acre parcels of the 100 acres owned by the plaintiff might answer the description, that is to say, the east half of his 100, or the north half, or the south half, or possibly the centre 50.

The question is, first, does the agreement sufficiently identify the 50 acres sold? If not, is oral evidence admissible to shew which was intended?

It was argued on behalf of the plaintiff that, inasmuch as the east 50 of the plaintiff's land would be directly opposite the 100 acres of the defendant, and as there was a fence on or near the line between the east and west 50 acres of the plaintiff's land, the east 50 thereof more fully satisfies the conditions than either the

north or the south or the centre 50. But it does not appear to me that the words "across the road from him" necessarily mean all the land of the plaintiff opposite all the land of the defendant to a depth of 50 acres. If the plaintiff's land were divided from north to south, the words are as well satisfied by either the north or the south 50. Nor does the fence, which is said to be somewhere near the boundary-line between the north and south halves of the plaintiff's land, lend aid to decision. It is not mentioned or referred to in the agreement, so that in my view the case turns upon the question as to whether or not oral evidence is admissible under the Statute of Frauds, which is pleaded.

In *Ogilvie v. Foljambe* (1817), 3 Mer. 53, referred to in subsequent cases as the leading case under the Statute of Frauds upon this question of the admissibility of oral evidence, there is language used by Sir William Grant, M.R., sufficiently broad in its terms to admit oral evidence in the present case. He says (p. 61): "The subject-matter of the agreement is left, indeed, to be ascertained by extrinsic evidence; and, for that purpose, such evidence may be received. . . Parol evidence has always been admitted, in such a case, to shew to what house, and to what premises, the treaty related."

In *North v. Percival*, [1898] 2 Ch. 128, it was held that where three of the boundaries were ascertained, and the fourth could be readily fixed so as to include 36 acres out of a larger acreage, the purchaser was entitled to specific performance.

In *Shardlow v. Cotterell* (1881), 20 Ch. D. 90, a house and premises were put up for sale by auction under conditions of sale which did not contain any description of what was sold, but were so expressed that it could be inferred from them that the subject of the sale was real estate. Shardlow became the purchaser. After the sale, the auctioneer signed and gave to him the following memorandum, at the foot of the conditions: "The property duly sold to A. Shardlow, Butcher, Pinxton, and deposit paid at close of sale;" and at the same time gave to him the following receipt "Pinxton, March 29, 1880. Received of Mr. A. Shardlow the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." It was held, reversing the decision of Kay, J., that the receipt, memorandum, and conditions contained a sufficiently definite

Clute, J.

1917

SPARKS

v.

CLEMENT.

Clute, J.
 1917
 SPARKS
 v.
 CLEMENT.

description of the property sold to enable the Court to receive parol evidence to shew of what the property consisted, and that the Statute of Frauds was no defence to an action by the purchaser for specific performance. It does not appear that the vendor owned any other property answering that description in that vicinity.

Plant v. Bourne, [1897] 2 Ch. 281, was chiefly relied on by the plaintiff. In that case A. agreed to sell and B. to buy "twenty-four acres of land, freehold, at T., in the parish of D. . . possession to be had on March 25 next. The vendor guaranteeing possession accordingly." In an action by A. against B. for specific performance:—Held, applying the principle of *Ogilvie v. Foljambe* and *Shardlow v. Cotterell*, that parol evidence was admissible to shew what was the subject-matter of the contract." Byrne, J., the trial Judge, refused to receive parol evidence to identify the subject-matter; and, referring to *Shardlow v. Cotterell*, said: "That case to my mind comes within the class of cases to which I have referred, where the memorandum furnishes upon the face of it a key by which you may reduce the words, on the face of them apparently uncertain, to certainty;" and referred also to the case of *Bleakley v. Smith* (1840), 11 Sim. 150, where the description was "the property in Cable Street." In appeal Lindley, L.J., at pp. 287, 288, said: "The decision of Sir William Grant has always been considered by everybody as a leading authority on the Statute of Frauds. It was never appealed, and it was commented upon and adopted in the case of *Shardlow v. Cotterell*. . . . In *Ogilvie v. Foljambe* parol evidence was wanted just as much as here to shew what was the subject-matter of the contract." Lopes, L.J., says (p. 289): "If parol evidence can be produced in this case to shew to what this contract related, namely, to these twenty-four acres, then it seems to me that there is an end of the case. It is clear to my mind that it does, because it appears that the vendor had only 24a. 1r. 26p. in this parish at this place, and that on the very morning in question when this contract was signed they walked over this land and discussed the matter." Chitty, L.J., says, at p. 290: "I think Mr. Plant means he is selling 'the twenty-four acres we have been looking at'. . . . Assuming that the parol evidence comes up to what has been stated, the result would be this: that Mr. Plant had twenty-four acres

lying within the metes and bounds sufficiently defined; and if the fact be ascertained that he had no other twenty-four acres that would answer that description, then there would be simply the laying the contract alongside that fact, and the result will be ascertained—namely, that the twenty-four acres lying within the metes and bounds was the property that was intended to be included in this description.”

It thus appears that the decision in that case turned upon the fact that the twenty-four acres in question was the only land owned by the vendor that would answer the description. That is precisely what is lacking in the present case. In the case referred to it seems to me to be clear that the oral evidence was permitted to be given to identify the particular land. In the present case something more is required. It has to be selected out of a larger acreage, from which any one of three different 50 acres would be equally applicable to the description in the written document. See also *Cowley v. Watts* (1853), 22 L.J.N.S. Ch. 591.

In *Owen v. Thomas* (1834), 3 My. & K. 353, a person, having sold a house at Newport, did not enter into any written contract, but wrote to his solicitor: “I have this day sold the house etc. in Newport to Mr. John Owen for 1,000 guineas . . . the money to be paid as soon as the deeds can be had from Mr. Deere; and you will be pleased to lose no time in getting them from him.” It was held by Sir John Leach, M.R., to be a sufficient memorandum within the Statute of Frauds.

In *Waldron v. Jacob and Millie* (1870), 5 Ir. R. Eq. 131, the vendor of a leasehold premises wrote a letter to her solicitor as follows: “I have closed with Mr. W. for this place.” Held, a sufficient memorandum in writing within the Statute of Frauds, and that parol evidence was admissible to shew what “this place” was. The Vice-Chancellor (Chatterton) pointed out (p. 136) that the letter was written at Thornbury, and that “this place” meant Thornbury.

In *Caisley v. Stewart* (1911), 21 Man. R. 341, a written offer, signed by the defendant in Manitoba, to purchase from the plaintiff land described only as “N. $\frac{1}{2}$ 23-4-3E,” and accepted by the plaintiff, was held sufficiently to describe the land to satisfy the

Clute, J.
1917
SPARKS
v.
CLEMENT.

Clute, J.1917SPARKSv.CLEMENT.

Statute of Frauds; and held that parol evidence was admissible to identify the lots.

In *McMurray v. Spicer* (1868), L.R. 5 Eq. 527, S. agreed to purchase from the plaintiff "the mill property, including cottages in Esher village—all the property to be freehold." The property was identified by parol evidence. It was held that the contract was not void for ambiguity, parol evidence being admissible for identification.

See also Fry on Specific Performance, 5th ed., pp. 168, 256 257.

E. W. Savory Limited v. The World of Golf Limited, [1914] 2 Ch. 566, though not in respect of land, turns upon sec. 3 of the Fine Arts Copyright Act, 1862, which declares that every assignment of a copyright "shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing"—thus following closely the language in the 4th section of the Statute of Frauds, requiring a memorandum in writing. In this case the only memorandum of an assignment of copyright was a receipt for a sum paid for "five original card designs inclusive of all copyrights. Subjects: four golfing subjects; one Teddy Bear painting." Held, that parol evidence was admissible to identify the designs intended, and the memorandum was sufficient within sec. 3 of the Act. Neville, J., who gave the judgment of the Court, said (pp. 573, 574): "I think that both *Shardlow v. Cotterell* and *Plant v. Bourn* are authorities to the effect that parol evidence to identify the subject-matter of a contract is admissible. Here I think there can be no doubt upon the construction of the memorandum itself that four particular golfing subjects are referred to, and it seems to me that the difficulty in both the cases I have referred to which was under consideration was whether the terms of the agreement indicated that no particular property was intended, but something which might be selected by one of the parties hereafter. In one case it was twenty-four acres of land in such and such a parish, and it was said that you could not say that that was an agreement to sell any particular twenty-four acres, and it was held that you could shew by parol evidence that a certain twenty-four acres had been marked out and that they were the subject-matter of the contract between the vendor and the purchaser." The fact

is emphasised that a certain twenty-four acres had been marked out as the subject-matter of the contract.

In *McClung v. McCracken* (1882), 2 O.R. 609, affirmed in (1883) 3 O.R. 596, Ferguson, J., refers to the case of *Rossiter v. Miller* (1878), 3 App. Cas. 1124, where Lord Cairns, at pp. 1140, 1141, says: "The question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest?*" And I find this maxim is applied to the construction of this particular clause of the Statute of Frauds referred to in nearly all the cases. The whole passage quoted by Ferguson, J., has a direct bearing upon this case.

In the authorities referred to, it will be seen, I think in all of them, that the material facts were either ascertained or could be ascertained, either by plan or definite location or measurement, or the fact that the parties had gone over the property and identified it in the course of the negotiations, so that the subject-matter could be made certain. In the present case, according to the plaintiff himself, the parties did not go upon the farm, nor was the particular 50 acres pointed out. The contract was drawn in the evening by the plaintiff, who did not sign it. The reason he did not sign it, I think, is apparent from the evidence. He had been negotiating for the sale of the whole 100 acres altogether, with another 50 acres adjoining. It would appear that those negotiations were on at the time this contract was signed. His explanation for not signing it himself is unsatisfactory. I think it a fair inference that he did not himself intend to be bound by the contract herein signed by the defendant until he ascertained whether or not he could make a sale of his whole 150 acres.

The matter was delayed for some days; and when, as I think, he was unable to effect a sale of the whole, he called upon the defendant to carry out his contract. The plaintiff did not satisfy me that he accepted the paper evidencing the bargain as a binding contract at the time it was made, and this is supported by the delay upon his part before taking any steps to have the transaction closed. When he did so it was then found that the 50 acres which he alleged was the one intended to be sold was covered by a mortgage of \$3,000, and by a blanket-mortgage including other property of some \$15,000.

There is also a difficulty in the defendant procuring a mortgage which he would have to get to raise the purchase-money.

Clute, J.

1917

SPARKS

v.

CLEMENT.

Clute, J.
1917
SPARKS
v.
CLEMENT.

For the reasons indicated above, I am of opinion that the document in itself is not a sufficient note or memorandum as required by the Statute of Frauds, and that parol evidence as to which 50 acres was intended is inadmissible. While it is not necessary that both parties under the statute should sign the memorandum required by this section of the Act, the fact that one party does not so sign may be very significant of what was intended at the time as to whether the bargain should be considered as binding when signed by one of the parties only. See *Clergue v. Plummer* (1916), 38 O.L.R. 54, at p. 57.

It is not a case where I think specific performance should be enforced, and the action is dismissed with costs.

[The judgment of CLUTE, J., was reversed, on the plaintiff's appeal, by the Second Divisional Court of the Appellate Division on the 21st December, 1917. See 13 O.W.N. 297. The reasons for the judgment in appeal will be reported in due course.]

1917
Oct. 26,

[APPELLATE DIVISION.]

BRADSHAW v. CONLIN.

Motor Vehicles Act—Motor Vehicle on Highway—Loss or Damage to Person Driving Horses—R.S.O. 1914, ch. 207, sec. 16 (1)—Construction of—Speed of Motor Vehicle when Approaching Horses—Knowledge of Approach of Horses—Reasonable Belief—Verdict of Jury—Judge's Charge—Misdirection—New Trial—Negligence—Onus—Sec. 23 of Act—Contributory Negligence.

By sec. 16 (1) of the Motor Vehicles Act, R.S.O. 1914, ch. 207, a person having the control or charge of a motor vehicle, outside the limits of any city or town, shall not approach a horse drawing a vehicle, or upon which any person is riding, "within 100 yards, or pass the same going in an opposite direction, at a greater speed than 7 miles an hour:"—

Held, in an action for damages for injury and loss sustained by the plaintiff by reason of his horses being frightened by the defendant's motor vehicle, upon a public highway, in which it was admitted that the defendant was driving at a rate of speed greater than 7 miles an hour when he approached within 100 yards of the plaintiff, that the trial Judge had misdirected the jury, who found a general verdict for the defendant, in telling them that sec. 16 (1) requires the motor vehicle to be at no greater speed than 7 miles an hour, only if the operator has reason to believe that he is approaching a horse, and that the restriction does not apply if he has no reason so to believe; and a new trial was directed (MEREDITH, C.J.C.P., dissenting).

Per MEREDITH, C.J.C.P.—Section 16 (1) applies to the ordinary case of drivers approaching and seeing each other—not to the case of one who does not see.

Per RIDDELL and ROSE, JJ.—Section 23 of the Act does no more than shift the onus of proof: it is open to the defendant, notwithstanding the provisions of that section, to shew negligence or contributory negligence on the part of the plaintiff.

AN appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, upon a general verdict of the jury at the trial, in favour of the defendant, in an action, in that Court, brought to recover damages for injury and loss sustained by the plaintiff by reason of his horses being frightened by the defendant's automobile, upon a public highway.

The plaintiff alleged that the defendant's car was being driven at an excessive rate of speed; that, he (the plaintiff) signalled the driver of the car to stop when the horses became frightened, but the driver did not stop; that the horses ran away, and the plaintiff was thrown from his waggon and injured. He charged negligence and failure to observe the requirements of the Motor Vehicles Act, R.S.O. 1914, ch. 207.

The appeal was upon the ground of misdirection; the plaintiff asked for a new trial.

October 10. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. McKay, K.C., for the appellant, argued, first, that the learned County Court Judge misdirected the jury in referring to evidence of careful driving generally by the defendant; secondly, that the doctrine of contributory negligence did not apply to a case like this, considering the provisions of the Motor Vehicles Act, sec. 23. The principal objection to the charge was, that the Judge had told the jury that the requirement of sec. 16 (1) of the Act, that the motor vehicle shall be driven at no greater speed than 7 miles an hour, is applicable only if the operator has reason to believe that he is approaching a horse, and that the restriction does not apply if he has no reason to believe that he is approaching a horse. The learned Judge was thus reading into the Act the words, "if a man knows he is approaching a horse or has reasonable ground for believing that he is approaching a horse;" that could not be the true reading of sec. 16 (1).

F. E. O'Flynn, for the defendant, respondent, said that the only formidable objection was the last one, and he contended that the learned Judge was right in his interpretation of sec. 16. It would be absurd to think that the Legislature meant that a driver must run his machine at only 7 miles an hour all the time, for fear that there might be a horse approaching, even when he had

1917

BRADSHAW
v.
CONLIN.

App. Div.
1917

BRADSHAW
v.
CONLIN.

Riddell, J.

no reason to anticipate such an approach, because sec. 11 allowed a speed up to 20 miles.

McKay, in reply.

October 26. RIDDELL, J.:—This was a case tried before the Judge of the County Court of the County of Hastings and a jury, resulting in a general verdict for the defendant—an action for damages by reason of a motor vehicle on a highway.

The plaintiff moves as for a new trial on the ground of misdirection by the learned County Court Judge, and gives three grounds of complaint:—

(1) That the learned County Court Judge told the jury that the evidence shewed that the defendant was a very careful driver, and added: "That evidence, it seems to me, ought to have some weight as to the carefulness of this driver."

But the evidence itself was given without objection; there was no specific objection to this part of the charge, counsel contenting himself with raising two specific objections, and concluding, "And I object to the whole charge." And, moreover, the trial Judge added at once, "but that won't excuse him if he drove wrong in this case."

I do not think this ground tenable.

(2) It is contended that the doctrine of contributory negligence is not applicable to a case such as this is.

It was argued at the trial that "where there is a statutory provision, and here is a statutory provision, imposing the obligation upon the motor driver to prove that it was not the result of his negligence, he can only relieve himself by proving that it is not the result of his negligence, and the statute says he is liable if he does not do it, so the doctrine of contributory negligence does not apply at all."

Substantially the same argument was advanced before us.

Section 23 of the statute, R.S.O. 1914, ch. 207, provides: "When loss or damage is sustained by any person by reason of a motor vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver."

But this simply shifts the onus, no more. In the absence of

such a provision, when a plaintiff comes into Court alleging damage sustained by reason of a motor vehicle on a highway, he must prove negligence or improper conduct on the part of the owner or driver of the motor vehicle: this provision removes this necessity, and makes it sufficient for the plaintiff to prove damage sustained by reason of a motor vehicle on a highway. It does not remove any defence; whatever would be matter of substantive defence before remains to the defendant.

Or, stating the same principle from a slightly different standpoint—when a defendant is called upon to prove that the damage was not caused by the negligence or improper conduct of the owner or driver, he may do so by proving that it was caused in whole or in part by the negligence—contributory or otherwise—of the plaintiff.

The argument seems to proceed from a misreading of such cases as *Groves v. Wimborne*, [1898] 2 Q.B. 402; *Baddeley v. Granville* (1887), 19 Q.B.D. 423, etc., etc.—but the contention cannot prevail.

(3) The third ground of objection is, that the learned County Court Judge told the jury that sec. 16 (1) of the Motor Vehicles Act requires the motor vehicle to be at no greater speed than 7 miles an hour, etc., only if the operator has reason to believe that he is approaching a horse—and that the restriction does not apply if he has no reason to believe that he is approaching a horse.

I think the objection well-founded—the language of the statute (sec. 16 (1)) is to my mind clear: “Every person having the control or charge of a motor vehicle . . . outside the limits of any city or town, shall not approach such horse” (*i.e.*, a horse drawing a vehicle or upon which any person is riding) “within 100 yards, or pass the same going in an opposite direction at a greater speed than 7 miles an hour . . . ” This is a specific and definite prohibition. Where the Legislature leaves anything to reasonable ground of belief, it says so, as in sec. 11 (2). Where the prohibition is clear, a *mens rea* is not necessary even in criminal matters: *Regina v. Prince* (1875), L.R. 2 C.C.R. 154. Moreover, a consideration of the purpose and object of the legislation will, I think, make it clear that there could have been no intention on the part of the Legislature to rest the duty of going at not more than 7 miles per hour upon the knowledge or reasonable belief of the operator of the motor vehicle.

App. Div.
1917

BRADSHAW
v.
CONLIN.
Riddell, J.

App. Div.
1917

BRADSHAW
v.
CONLIN.
Riddell, J.

The Act is, of course, for the protection of those in the highway against accident from motor vehicles: provision is made that the driver shall not be juvenile in years (sec. 13), must be sober (sec. 14), and careful (sec. 11 (2)). The superior limit of the speed is fixed at 20 miles per hour (sec. 11 (1)); the motor, however, is not to be run at the top-speed under all circumstances, but the speed must be limited by all the circumstances of travel, actual or reasonably anticipated (sec. 11 (2)).

Then, as I think, sec. 16 contains a special protection for horses on the highway in use for driving or riding. It is surely more reasonable to protect such horses by saying to the operator, "You must not run at a greater rate than 7 miles an hour at points on the road where you cannot see clearly 100 yards ahead," than to make the owner of the horse take all the risk of the operator running at 20 miles an hour till he sees the horse perhaps a few yards away. The motor vehicle driver can protect himself and avoid danger, the man on or driving the horse cannot.

I think that the charge in this respect of the County Court Judge is erroneous. As the verdict was general, it is impossible to say that the error might not have affected the verdict: and there, consequently, should be a new trial. The defendant should pay the costs of this appeal and of the former trial.

ROSE, J., agreed with RIDDELL, J.

LENNOX, J.:—In the view I entertain of the proper disposal of the appeal, it is not necessary to go very carefully over the evidence adduced at the trial: and I have not done so. It is admitted that the defendant at the time of the happening of the injuries complained of was the driver of a motor vehicle on the highway where the accident occurred, within the meaning of sec. 23 of the Motor Vehicles Act, R.S.O. 1914, ch. 207; and, whatever the actual speed at which he was driving may have been, it is common ground that the defendant approached the plaintiff's horses and vehicle upon the highway, and within 100 yards, "at a greater rate of speed than 7 miles an hour."

Section 16 of the Act, in addition to imposing upon the driver of a motor vehicle the duty, when approaching a vehicle drawn by a horse (or horses), of exercising "every reasonable precaution to

prevent the frightening of such horse and to ensure the safety and protection of any person . . . driving the same," in express and definite terms provides that, upon a rural highway such as this was, he "shall not approach such horse within 100 yards . . . at a greater rate of speed than 7 miles an hour." It is admitted that, if the language of this section is absolute and unqualified, the defendant broke the law upon the occasion referred to.

The learned Judge at the trial said: "It does not seem to me at all reasonable that that section could possibly mean that a man without any knowledge of approaching a horse is bound to make his speed 7 miles an hour. It does seem to me that that section must mean that a man approaching a horse with a knowledge that he is so approaching a horse, with some reasonable ground to believe that he may be so approaching a horse, must within 100 yards of it, and while passing it, not drive at a speed greater than 7 miles an hour. I reach that conclusion partly from common sense and partly from sec. 11 (1), which reads: 'No motor vehicle shall be driven upon any highway . . . outside of a city, town or village at a greater rate of speed than 20 miles an hour;' and then to say he is limited to 7 miles an hour, if he has no reason to believe he is approaching a horse, does not seem to me to be quite consistent. Therefore, I take the responsibility of instructing you that that section means: If a man knows he is approaching a horse or has reasonable grounds from which he should know he is approaching a horse, he must drive at 7 miles an hour within 100 yards; but, if he has no knowledge whatever and could have no knowledge whatever, then I think I shall instruct you he is not bound by that 7 miles an hour until the point where he does know or could know that a horse was approaching; I take that responsibility."

The argument of counsel for the respondent was to the same effect. With great respect, I am of opinion that the learned Judge erred in so interpreting the statute to the jury. The language of the Legislature is explicit and positive—it does not say "knowingly" or "with reasonable ground to apprehend" or introduce any qualification, nor do I find any conflict between sec. 16 and sec. 11 or other sections of the Act. Reasonable or unreasonable, wise or unwise, if the enactment is clearly expressed, it is the law.

App. Div.
1917

BRADSHAW
v.
CONLIN.
Lennox, J.

App. Div.
1917

BRADSHAW
v.

CONLIN.

Lennox, J.

The Legislature, like the citizen, must be taken to mean what it definitely and positively declares. It is no part of my duty or privilege to declare whether, in my opinion, it is a good law or the contrary. If it has been enacted inadvertently, it can be amended; but not in Court; and the argument that it is unreasonable is irrelevant if the meaning of the language used is unambiguous—as I think the language of sec. 16 is. And to my mind there are “pros and cons” when you attack the section as a matter of legislative discretion. Twenty miles an hour may be quite safe in the light of day and along a level, straight, and unobstructed highway, but it is another matter if motor drivers are allowed to swing over peaks and around curves and corners at the same speed. I am very far from thinking that the Legislature did not weigh the whole question carefully and view it from the opposing standpoints of convenience and safety.

It was not, I think, suggested at the trial; but I think it is clearly a case in which questions should have been submitted to the jury.

I am not satisfied that this action has been properly tried. I do not find it necessary to refer to all the matters complained of in the Judge’s charge. I think, however, that it must be said that, in view of what followed, part of which I have already set out, the learned Judge’s instruction as to the meaning of sec. 23, and how to apply it, can hardly be regarded as satisfactory, although it might be sufficient where the question of the infraction of a positive provision of a statute did not arise.

Referring to the statute-law, as read by Mr. Porter, the learned Judge said: “I don’t know that I need repeat it. Perhaps I might just touch it. First, that the onus of proof is on the automobile man. If a man brings an action, he has to prove his case, but here the other man, the defendant, has to prove that he didn’t cause the damage, and so the burden of proof is upon Mr. Conlin to shew that he was not responsible in law for this damage; if he has satisfied you to that effect, that answers the law.”

I am not quite sure that I apprehend what is meant by: “The burden of proof is upon Mr. Conlin to shew that he was not responsible *in law* for this damage; if he has satisfied you to that effect, that answers the law;” or that the provision of the statute,

as expounded, would be clearer to the jury than the interpretation is to me. The question for consideration of the jury was a pretty narrow one; and, as there may be a new trial, I refrain from saying what the learned Judge should have said; but, with the fact that the defendant was driving at least 10 to 12 miles an hour admitted, "the negligence or improper conduct" of the defendant ceases to be merely a rebuttable presumption under sec. 23 (if my interpretation of sec. 16 is correct), and the only avenue of escape would appear to be, as the Judge stated in the earlier part of the sentence, for the defendant to prove "that he didn't cause the damage." I fear that the jury had not a clear conception of the issues to be tried.

The defendant would, I think, have been well advised not to have asked for costs when the action was dismissed. As it is, the plaintiff is entitled to a new trial if he desires it, and to the costs of the appeal; the costs of the former trial and the costs of the action should abide the event. There is, however, no large sum involved, and the parties or their solicitors should get together and settle their differences.

MEREDITH, C.J.C.P. (dissenting):—The jury found that the defendant was not guilty of any negligence on the occasion when the plaintiff was injured, so nothing turns upon any question of contributory negligence; the only question is: whether the plaintiff should have a new trial because of any misdirection by the learned trial Judge as to the meaning of sec. 16 of the Motor Vehicles Act.

He told the jury, in effect, that the provisions of this section of the Act are applicable only when the person having the control or charge of a motor vehicle knows, or should know, that he is approaching a horse being driven or ridden upon the highway on which he is travelling.

I agree with him in that interpretation of the section as to knowing, but not as to should know.

The whole wording of the section indicates that the Legislature was dealing with the case of a person who knew that he was approaching such a horse, and that consequently care should be taken such as the occasion, and the statute, required. The driver is to exercise every reasonable precaution to prevent frightening

App. Div.

1917

BRADSHAW

v.

CONLIN.

Lennox, J.

App. Div.
1917

BRADSHAW

v.

CONLIN.

Meredith,
C.J.C.P.

the horse and to ensure the safety and protection of the person riding or driving the horse. How is that to be done by one who does not see the horse or know of its approach? Different circumstances call for different precautions. Is the person driving the vehicle to be continuously exercising all kinds of precautions for fear a horse may be approaching him without his knowledge of the fact. Is he never to drive more than 7 miles an hour, although the 11th section provides that he may go 20 miles an hour, for fear that a horse may be within 100 yards of him? One hundred yards is quite a distance. Is he to signal his desire to pass, and give the rider or driver opportunity to turn out so that he may be passed with safety, without seeing or knowing that the rider or driver is there? And, if any horse coming towards him appears to be frightened, is he to stop though unaware of such appearance? Appears to whom to be frightened? Obviously, expressly, to the person driving the motor vehicle. Is not this conclusive of the question? And, again, if the horse appears to be frightened, or if the person driving the motor vehicle is signalled to stop, he must stop to allow the horse to pass, whilst not only the vehicle, but the engine of it, must be stopped by its driver. How is all this to be accomplished without knowledge of the signal, or of the fear, or of the approach? And, beside all this, why slacken speed when not in sight of horse or driver? What difference can it make to either of them, when they cannot know anything about it, whether the speed is 7 or 8 or 20 miles an hour? And speed can be reduced from 8 or from 20 to 7 almost instantly when in sight.

The whole section, which is in these words—

“16.—(1) Every person having the control or charge of a motor vehicle shall, when upon a highway and approaching any vehicle drawn by a horse, or a horse upon which any person is riding, operate, manage and control such motor vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of such horse and to ensure the safety and protection of any person riding or driving the same, and, outside the limits of any city or town, shall not approach such horse within one hundred yards, or pass the same going in the opposite direction at a greater rate of speed than seven miles an hour, and, if going in the same direction, shall signal his desire to pass and give the rider or driver an opportunity to turn out so that he may be

passed with safety, and if any such horse going in the opposite direction appears to be frightened or if such person is signalled so to do he shall stop such motor vehicle, including the motor, and shall remain stationary so long as may be necessary to allow such rider or driver to pass or until directed by him to proceed; and in case any animal ridden or driven by such rider or driver appears to be frightened such person and the occupants of the motor vehicle shall render assistance to such rider or driver.

“(2) A person having the control or charge of a motor vehicle shall not sound any bell, horn or other signalling device so as to make an unreasonable noise, and an operator of any motor vehicle shall not permit any unreasonable amount of smoke to escape from the said motor vehicle, nor shall such operator at any time, by cutting out the muffler or otherwise, cause such motor vehicle to make any unnecessary noise.”

—must be borne in mind; we cannot expect to reach a right conclusion if we deal with a few of its words only, divorced entirely from their context.

We are of course to give full effect to the provisions of this section of the Act, as well as to all other legislation, but we must take care that zeal for full effect does not carry us beyond the requirements of the legislation, does not cause us to attribute to words a meaning which produces absurd effects, if the words are capable of an interpretation which produces reasonable effects—care that we do not make the double mistake of misunderstanding the words of the legislation and of then charging them with the unsatisfactory results which come only out of our own error. There is, assuredly, nothing in the words of the section in question which constrains us to hold that they are applicable to cases in which the person in control of the car has no knowledge of the approach of the horse; everything is based upon such knowledge, without which it is impossible to comply with the provisions of the section. Otherwise, the person in the control of the car, to be quite safe, would be obliged always to come to the crest of the hill where the accident happened, performing all that the section requires—not merely reduction of speed to 7 miles an hour—because over it, and out of sight, there might be a horse approaching within the distance of 100 yards, and this though perhaps not once in a thousand times there should be a horse so approaching:

App. Div.
1917

BRADSHAW

v.

CONLIN.

Meredith,
C.J.C.P.

App. Div.
1917

BRADSHAW
v. ^N
CONLIN.

Meredith,
C.J.C.P.

and a driver wholly unused to the road, and so unaware of the sharp dip on the other side of the crest of the hill, would also be an offender against the provisions of the section—and liable to its penalties—if he did not guess that there might be, and act as if, a horse was approaching, though there were none within miles of the place: so too after dark one would always be in that predicament, because there might be a horse, invisible, within the 100 yards' distance.

The section of the Act in question is quite capable of the common sense interpretation of it applied in part to it by the County Court Judge; and should not be given an interpretation which must lead to fantastic as well as unreasonable results: such as, for another instance, tying timid drivers down to 7 miles an hour always, for fear of running against the provisions of this section—and incurring its penalties—and towards an approaching horse, which, for various reasons, might not be visible 100 yards away, or less. Rapid traffic is the purpose of motor vehicles: if limited to horse-speed only, their usefulness is taken away.

What the Act means, as it seems to me, is: that the section in question shall apply to the ordinary—999 times out of a 1000—case of drivers approaching and seeing each other. Why make it applicable to one who does not see? For no real purpose and with the results some of which I have mentioned.

If he do not see, and is not guilty of any kind of negligence in not seeing, what reason or excuse can be given for making him answerable for any consequences? Whilst, if he be guilty of some kind of negligence in not seeing, and so not taking proper precautions, what need is there to have resort to this section of the Act, for, apart from it, as well as under sec. 11, he is answerable for the consequences of his negligence?

I would dismiss the appeal.

New trial ordered; MEREDITH, C.J.C.P., dissenting.

[APPELLATE DIVISION.]

1917

Oct. 26.

DEVINE v. CALLERY.

Fixtures—Wooden Building Erected by Tenant on Demised Land—Ownership—Chattel—Affixing to Freehold—Severance—Evidence—Right of Removal—Privilege—License—Provision in Informal Lease—Estoppel—Assignable Rights—Succession of Tenants—Reasonable Time for Removing Building—Damages—Nominal Damages—Trespass.

A wooden building, erected upon the plaintiff's land by a tenant, was held to be a chattel and not part of the land; and the judgment of the County Court of the County of Hastings dismissing an action brought to recover damages for the removal of the building from the land, was affirmed.

The tenant who built the house sold it to D. Bros., his successors in the tenancy. In the written lease to D. Bros., signed but not sealed by the plaintiff, it was expressly provided that "D. Bros. are to have the privilege to move the house . . . at the end of eight years," but that "D. Bros. are to give" the plaintiff "the first chance to buy at the end of the eight years." The plaintiff was given the opportunity to buy at the end of the period, but refused it. The building was sold by D. Bros. to G. and by G. to C. :—

Held, by MEREDITH, C.J.C.P., that the lease was not a mere license; the "privilege" expressed in it was not mere leave, but an essential part of the lease—part of the consideration for which the rent provided for in the lease was paid throughout the term. There was no evidence that the building was affixed to the land; the plaintiff treated the building as a chattel, and stood by and consented to a sale of it.

Per RIDDELL and LENNOX, JJ. :—The house was the property of the tenant who built it; by the sale to D. Bros. it became theirs, and by the sales to G. and C. the property of each in succession. The offer to sell to the plaintiff was refused. C.'s house was on the plaintiff's land; and, even in the absence of the provision in the lease, a right to remove within a reasonable time must be implied. At the most, the plaintiff's only right would be a technical action for trespass, in which only nominal damages would be given; and, the Court will not on appeal grant a new trial for nominal damages or itself award nominal damages.

If the agreement of the plaintiff contained in the lease was to be considered, the right of a tenant to remove a building is a power or license coupled with an interest, and is assignable.

Oswald v. Whitman (1889), 22 N.S.R. 13, and *Gray v. McLennan* (1886), 3 Man. R. 337, approved.

Per Rose, J. :—Assuming that the building was affixed to the land, as might fairly be inferred from the evidence, it became part of the land.

Horwich v. Symond (1914-15), 110 L.T.R. 1016, 84 L.J.K.B. 1083, *Hallen v. Runder* (1834), 1 C.M. & R. 266, and *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, preferred to *In re Hulse*, [1905] 1 Ch. 406.

When the house became part of the land, as between the plaintiff and the tenant who built the house, it remained subject to his right to bring it back to the state of a chattel again, by severing it from the land; that right was assignable, and no deed or even writing was necessary.

Hallen v. Runder, *supra*, and *Lee v. Gaskell* (1876), 1 Q.B.D. 700, referred to on this point.

The plaintiff could not have damages against C. for exercising that right, unless he had lost it by not exercising it before the end of the term. C. had a reasonable time, after the expiration of the term and after the plaintiff's refusal to purchase, within which to exercise his right of removal; and, there having been no unreasonable delay, the action failed.

AN appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, dismissing an

1917
DEVINE
v.
CALLERY.

action in that Court, brought to recover damages for the alleged wrongful removal by the defendants of a wooden building from the premises of the plaintiff to those of one of the defendants.

October 10. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. McKay, K.C., for the appellant, argued, first, that the house became part of the land, and the grant of it, not being under seal, was void: *Beaver v. Reed* (1852), 9 U.C.R. 152. Secondly, the privileges given in regard to the house were mere personal rights, and, being so, were revocable, and therefore not assignable: *Ross v. Fox* (1867), 13 Gr. 683; *McKenzie v. McGlaughlin* (1884), 8 O.R. 111; *McLeod v. Lawson* (1906), 8 O.W.R. 213, 335; *In re Davis & Co.* (1888), 22 Q.B.D. 193; *Brown v. Metropolitan Counties Life Assurance Society* (1859), 28 L.J. N.S. Q.B. 236; *Millbourn v. Lyons*, [1914] 2 Ch. 231; *Hurst v. Picture Theatres Limited*, [1915] 1 K.B. 1.

G. W. Morley, for the defendants, respondents, contended that the house had always been treated as a chattel by the parties, including the plaintiff. Therefore the right was in the defendants to remove the house. This right to remove was a power coupled with an interest, and was therefore assignable. The plaintiff admitted that the only interest which she had in the house was the first right to buy. She had been offered this, and had refused.

McKay, in reply.

October 26. MEREDITH, C.J.C.P.:—One Deremo, or Dermo, as named in the lease in question in this action, built and owned a wooden, or “frame” as it is commonly called, house. The house was upon the plaintiff’s land, of which Deremo was tenant under a lease for a term of ten years. In that tenant’s time the plaintiff had, according to her testimony at the trial of this action, no interest in the house, but she “expected to have” the first chance to buy it. Deremo sold the house to the Doyles, with the knowledge and consent of the plaintiff, plainly expressed in the writing drawn up by her in her own handwriting as a lease by her of the same land to them for a term of eight years, beginning when Deremo’s term ended: and, in addition to that knowledge and consent, she expressly provided in this writing that “Doyle

Bros. are to have the privilege to move the house Dermo built at the end of eight years," but that "Doyle Bros. are to give Mrs. Devine the first chance to buy the house at the end of the eight years."

There was no provision against assigning the lease, or against subletting the land; and several sales of the house and assignments of the term were made, the last having been made to the defendant Callery. The sales and assignments seem to have been made to the knowledge, and with the consent, of the plaintiff, though that is immaterial.

At the end of the eight years, the defendant Callery, accompanied by one of the Doyles, went to the plaintiff and gave her "the first chance to buy the house;" but she asked for the rest of the day to give her answer. No answer was given: but subsequently she claimed to be entitled to it without buying it, or paying anything for it.

The house was removed by the defendant Callery, assisted by the defendant Wright, to the land of the defendants the Deloro Smelting and Refining Company Limited, and thereupon this action was brought to recover from all of them \$500 for damages for such removal of the building.

In these circumstances, the plaintiff asks us, first, to find that the wooden building was not a chattel, but was part of her land, notwithstanding the following facts: that there is no evidence, of any kind, in the case, that the building was affixed to the land; that wooden buildings are often chattels; that she, for probably eighteen years, treated it as a chattel, first the property of Deremo, then, in succession, of the several purchasers of it, as if a chattel in which she had no interest but the first chance to buy as a chattel; that fixtures can be as effectually severed from the land by a stroke of the pen as by a stroke of axe and hammer, and that she, by the strokes of her pen in her own hand, in effect, declared that the house was not hers but was her tenant's, her only right as to it being a "first chance" to purchase it; and that standing by and consenting to a sale of the house precludes her from denying the vendor's right to sell, even if he really had none.

But such a finding, if it could be made as she asks, would be insufficient for her purposes in this action, so she is obliged to go a step further, and ask us, after finding that the house is part of

App. Div.
1917

DEVINE
v.
CALLERY.

Meredith,
C.J.C.P.

App. Div.
1917

DEVINE
v.
CALLERY.

Meredith,
C.J.C.P.

her land, to rule that all the privileges to remove the house which she gave were in law invalid, because they were merely revocable licenses which she revoked, or else because, though in writing, the lease in question was not granted over her seal, though it was over her signature.

Here again the plaintiff overlooks the obvious fact that her lease is not a mere license: that the "privilege" expressed in it is not mere leave, but is an essential part of the lease, and an essential part quite common in leases. It was part of the consideration for which the rent provided for in the lease was paid throughout the term created by it.

As stated during the argument, the appeal seemed, and it still seems, to me to be plainly a hopeless one, as the action also was.

I would therefore dismiss the appeal, affirming the judgment, at the trial, dismissing the action.

RIDDELL, J.:—The plaintiff is the owner of certain land in the township of Marmora; part of this is a little lot of about an acre on a corner by the gravel-road. One Deremo, who was he tenant, built a house, etc., on this lot, on the understanding that he was to have the right to move it off—the plaintiff expressly says that she had no property in the house at all. Deremo sublet the lot to the Doyle Brothers, with the consent of the plaintiff, and they took over the house, etc., from Deremo.

It was then that the document was signed which is so much in controversy in this appeal—it is as follows:—

"Deloro Mar 19, 1909.

"Mrs. Marget Devine agrees to lease to Patrick of Thos. Doyle her store and lot and barn or stable for a term of one year or eight for the sum of Three Dollars \$3.00 per month.

"What repairs Doyle Bros. put on the building is to be at their own expense. Doyle Bros. are to have the privilege to move the house Dermo built at the end of eight year.

"Doyle Bros. are to give Mrs. Devine the first chance to buy the house at the end of eight years.

"Margaret Devine.

"Pat. Doyle

"G. B. Dermo.

"Thomas Doyle, Jr.

"Witness."

The house etc. were used as a store, outbuildings, etc., for the purposes of a little trade at the side of the road at Deloro. The Doyle Brothers dissolved, and the partner Patrick Doyle later sold out to one Gilliam, after about two years' occupation of the premises, and Gilliam bought the house etc. The plaintiff did not acknowledge the tenancy of Gilliam, but continued to hold the Doyles for the rent, so apparently the rent was paid by Gilliam to one of the Doyles, and by him to the plaintiff. During this time, according to the plaintiff's story, she did not know whether Gilliam owned the house or not, but she had heard of it—the learned trial Judge finds, and I agree with him, that she knew that Doyle had sold the house to Gilliam, and made no claim to its ownership.

The defendant Callery bought the house from Gilliam on the 10th April, 1916; before doing so, Callery went to the plaintiff to see if the lease could be extended; the plaintiff gave him no satisfaction—all she said was that the lease was not up. Callery paid \$500 for the house, Gilliam to pay the year's rent.

When the term was up, Callery and one of the Doyles asked her if she would buy the house, and she said, "No, the house is mine."

Callery then obtained assistance and removed the house with all convenient speed.

The plaintiff sued Callery for the value of the house etc.: but failed at the trial before the Judge of the County Court of the County of Hastings. She now appeals.

I do not think she can succeed. In the first place, there is no evidence that the house was attached to the freehold, and that it would therefore (in the absence of other circumstances) become real property. But, even if it were proved, the plaintiff's case is not advanced. A house built by one person upon the land of another, on the agreement between them that the house shall be the property of the builder, does not, according to some authorities at least, as between them, become part of the freehold, but is the personal property of the builder. In any case the house was, as the plaintiff herself swears, the property of Deremo: by the sale to the Doyles it became theirs, and by the sales to Gilliam and Callery the property of each in succession. The agreement none the less bound the Doyles and their successors in title to give the plaintiff the option to buy on the termination of the lease: this was offered and the offer refused. Callery's house was on the

App. Div.
1917

DEVINE
v.
CALLERY.
Riddell, J.

App. Div.
1917

DEVINE
v.

CALLERY.

Riddell, J.

plaintiff's land: under the circumstances of this case—even in the absence of the plaintiff's agreement—a right to remove within a reasonable time must be implied.

At the most, the plaintiff's only right would be a technical action for trespass, and only nominal damages would be given. The Court will not on appeal grant a new trial for nominal damages or itself award nominal damages: *Milligan v. Jamieson* (1902), 4 O.L.R. 650; *Simonds v. Chesley* (1891), 20 S.C.R. 174; *Scammell v. Clarke* (1894), 23 S.C.R. 307.

If the agreement made by the plaintiff be considered necessary to support the right of the defendant, the right of a tenant to remove buildings from land is a power, license (call it what you will), coupled with an interest—*Poole's Case* (1703), 1 Salk. 368; *Minshall v. Lloyd* (1837), 2 M. & W. 450—and is of course assignable.

In *Oswald v. Whitman* (1889), 22 N.S.R. 13, it was held that where in a lease of land there was a provision that the lessee should have the right to remove buildings thereon at the end of the term, the lessor to have the refusal of them—the buildings being affixed to the freehold—and the landlord refused to have anything to do with the buildings, the tenant had the right to remove the buildings or to sell to any other person.

The same rule was in effect laid down in *Gray v. McLennan* (1886), 3 Man. R. 337, where, in a very similar case, the Court said: "The plaintiff . . . not having made . . . an election" (to purchase the building) ". . . has forgone the right the lease gave him; and the lessee and those claiming under him have the right to it now . . . The lessee or his assignees had at the expiration of the term a reasonable time to remove the building . . ."

I agree in the law thus laid down, and would dismiss the appeal with costs. Other helpful authorities are *Woodfall's Landlord and Tenant*, 19th ed., pp. 739, 740, 753; *Wood v. Hewett* (1846), 8 Q.B. 913; *Mant v. Collins* (1841), *ib.* 916, n.; *Lancaster v. Eve* (1859), 5 C.B.N.S. 717; *Stansfeld v. Mayor etc. of Portsmouth* (1858), 4 C.B.N.S. 120, especially at p. 123; *Saint v. Pilley* (1875), L.R. 10 Ex. 137; *Hobson v. Gorringe*, [1897] 1 Ch. 182, at p. 195; *Philpot v. Bath*, [1905] W.N. 114.

LENNOX, J., agreed with RIDDELL, J.

ROSE, J.:—It was not clearly proved that the little house was ever affixed to the land; but the defendant tells us that when he was preparing to move it he dug and chopped around it, from which, I think, we may fairly assume in the plaintiff's favour that it was annexed.

Having been so annexed, it became, as it seems to me, part of the land: *Horwich v. Symond* (1914), 110 L.T.R. 1016; *S.C.*, in the Court of Appeal (1915), 84 L.J.K.B. 1083; *Hallen v. Runder* (1834), 1 C.M. & R. 266; *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335. This view is opposed to that of Buckley, J., in *In re Hulse*, [1905] 1 Ch. 406, quoted without comment in *Foa on Landlord and Tenant*, 4th ed., p. 696, and questioned in *Halsbury's Laws of England*, vol. 18, p. 422; but it seems to me to be the only view that is open to us, having regard to the cases referred to in *Horwich v. Symonds* and to the other cases to which I have referred. However, while the house became part of the land, the cases already referred to make it quite plain that, as between the plaintiff and the builder, Deremo, it remained subject to the right of Deremo to bring it back to the state of a chattel again, by severing it from the land; and such cases as *Hallen v. Runder*, 1 C.M. & R. 266, and *Lee v. Gaskell* (1876), 1 Q.B.D. 700, make it equally plain that Deremo's right was one that could be assigned, and that for its assignment no deed, or even writing, was necessary. This right of Deremo's was transferred by him to the Doyles, and by the Doyles to Gilliam, and by Gilliam to the defendant Callery; and it seems clear that the plaintiff cannot have damages against the defendant Callery for exercising it, unless that defendant lost it by not exercising it before the end of the term. Now, the plaintiff had the right to purchase the house from the defendant Callery at the end of the term, and I think that defendant, therefore, had a reasonable time, after the expiration of the term and after the plaintiff's refusal to purchase, within which to exercise his right of removal; and, there having been no unreasonable delay on his part, I think the action fails. My opinion being that the defendant's right to the "fixture" did not originate in or depend upon a "license" from the plaintiff, I do not enter upon any discussion of the points raised as to the right of the plaintiff to revoke and the right of the Doyles to assign the so-called license.

I would dismiss the appeal.

Appeal dismissed with costs.

App. Div.

1917

DEVINE

v.

CALLERY.

Rose, J.

1917

[APPELLATE DIVISION.]

Oct. 26.

MAPLE LEAF LUMBER CO. v. CALDBICK AND PIERCE.

Sheriff—Sale of Logs under Execution—Rule 557—Advertisement of Sale—Misrepresentation as to Quantity of Logs—Effect of—Sale to Innocent Purchaser—Absence of Fraud—Liability of Sheriff—Action by Execution Debtors and Execution Creditors—Special Circumstances—Conduct—Estoppel—Failure to Prove Actual Damage—Negligence—Costs.

The judgment of CLUTE, J., 39 O.L.R. 201, was reversed by a Divisional Court of the Appellate Division; RIDDELL and ROSE, JJ., dissenting in part.

Held, in this agreeing with the opinion of CLUTE, J., that the failure to give the notice of a sheriff's sale under a *fi. fa.*, as required by Rule 557, or a defect in the notice, does not invalidate the sale to an innocent purchaser.

Review of the authorities.

And *held*, that the defendant P. was an innocent purchaser.

Held, also, that there was no fraud, and no ground upon which the defendant P. could be held answerable in damages to any party to this action.

Held, also, in the special circumstances set out below, and having regard to the conduct of the plaintiffs, that the defendant C., the sheriff, was not liable either to the execution debtors, the original plaintiffs, or to the execution creditors, the added plaintiffs.

But the sheriff was not entitled to recover his costs of the action from the plaintiffs, because of the loose manner in which his duties were performed.

Per HODGINS, J.A.:—The sheriff was not guilty of negligence such as had produced damage to any party suing—actual damage must be proved.

Per RIDDELL and ROSE, JJ.:—It was the duty of the sheriff to both creditors and debtors to make all that he could out of the goods seized under his writ; the statement of the debtors that there was nothing to seize could not save the sheriff, for he did seize; no conduct by way of estoppel was proved; and the sheriff was liable to the plaintiffs for the damages they had sustained from his omission to perform his duty in the premises.

APPEALS by the defendants Caldbick and Pierce and cross-appeal by the plaintiffs from the judgment of CLUTE, J., 39 O.L.R. 201.

October 11. The appeals were heard by MEREDITH, C.J.C.P., HODGINS, J.A., RIDDELL, LENNOX, and ROSE, JJ.

H. M. Mowat, K.C., for the defendant Caldbick. This defendant, the sheriff, accompanied and instructed by the plaintiff Reamsbottom, seized all the logs in the woods belonging to the plaintiff company, and it would be unreasonable and impracticable that he should be required to identify and ascertain the ownership of each separate log, as none of them had any timber-marks or brands of ownership on them. The description of the logs as "about 300 logs in the woods" deceived or misinformed nobody present at the sale, nor were bids based on such a description, but upon the sheriff's statement that he was selling all the logs belonging to

the Maple Leaf Lumber Company, and bidders at the sale had informed themselves as to the probable number of logs. The sale was as effective and as productive as if the whole number of logs had been specifically mentioned. At any rate, the plaintiffs, by their officers, were present at the sale, and heard the sheriff's verbal description, and stood by and allowed the statements to go undisputed, and the plaintiffs are estopped from disputing the validity of the sale. Also, the plaintiffs had asserted that there was nothing to seize. There was brisk bidding at the sale, and no better price would have been obtained if the advertisement of sale had mentioned a greater number than 300. The defect in the advertisement did not avoid the sale. The question is what the sheriff sold, not what he advertised: *Osborne v. Kerr* (1859), 17 U.C.R. 134, at p. 141; Archbold's Common Law Practice, 14th ed., vol. 1, p. 840; *Sabeans v. Edwards* (1917), 32 D.L.R. 569; Halsbury's Laws of England, vol. 14, pp. 54, 55, 56, 57. In the circumstances of the case, the sheriff was not guilty of any actionable negligence. The Court should do all that it can to protect its officers.

J. Y. Murdoch, for the defendant *Pierce*, argued that the sale should be upheld. *Pierce* had offered to turn over his bargain to the plaintiffs, but the offer had been refused. The offer was still open. *Pierce* had been guilty of no fraud or collusion, was an innocent purchaser for value without notice, and, if found liable for damages, should have relief over against the sheriff.

Gideon Grant and *P. E. F. Smily*, for the original plaintiffs. The advertisement of sale was defective, there was not a proper seizure, and the price received was grossly inadequate, all shewing actionable negligence on the part of the sheriff, and so the sale should be set aside as improper, as the property never passed: *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; *Edge v. Kavanagh* (1888), 24 L.R. Ir. 1. The sheriff should have made more inquiries about the number of logs in the woods and their value, and should have obtained a better price at the sale. As he did not, he was liable in damages: *Keightley v. Birch* (1814), 3 Camp. 521.

McGregor Young, K.C., for the added plaintiffs, argued that the lack of proper public notice, as required by Rule 557, avoided the sale.

Mowat, in reply.

App. Div.
1917

MAPLE
LEAF
LUMBER
CO.
v.
CALDBICK
AND
PIERCE.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.
CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

October 26. MEREDITH, C.J.C.P.:—Originally this action was brought, in the name of the plaintiffs, an incorporated company, against the defendants Caldbick and Pierce, to set aside a sale by the former defendant, as Sheriff of the District of Temiskaming, under a writ of *fi. fa.* in his hands for execution, to his co-defendant, of the goods in question. Subsequently the execution creditors were made parties to the action, and they too make a like claim against the original defendants: and the defendant Pierce made, in third party proceedings, a claim over, against his co-defendant originally, for indemnity—as upon a warranty of title—in case of the sale being set aside. Some of these proceedings seem to have been quite irregular, but at the trial an amendment was made making the execution creditors co-plaintiffs of the execution debtors, instead of defendants, and the whole case, in all its features, was fully tried, so that we are in a position to do justice to each of the parties as well as if two actions had been brought, and as if there had been no irregularity of pleading or proceeding, and, in the interests of all parties, should so deal with it now.

For the plaintiffs the execution creditors, the single contention was: that Rule 557—having the effect of a statutory enactment—requires public notice of a sheriff's sale under a *fi. fa.*; that there was no such notice given of the sale in question; and that, consequently, it was invalid. But I am unable to consider that contention well-made in either respect. Notice of the sale in question was given in manner required by the Rule: the most that can be said against it is, that the goods in question, one item only out of seven set out in the notice, were not accurately described; that they were described as "about 300 logs in the woods," whereas there were really about 4,000: and (2) failure to give the notice required does not, in itself, invalidate a sale.

Speaking of defects and informalities in sheriffs' notices of sale, it was said in the case of *Jarvis v. Brooke* (1854), 11 U.C.R. 299, 301, 302: that the Act requiring advertisement in that case did not state whether any defect or informality in it should or should not invalidate a sale, though another Act expressly provided that it should not, yet "upon general principles such an omission should not affect the validity of the sale, but should be treated merely as a direction of the statute, which the sheriff

is to observe at his peril, being subject to an action at the suit of the party injured if he neglect his duty in this respect."

In the case of *Osborne v. Kerr*, 17 U.C.R. 134, it was said (p. 140) that "all must turn upon the question what the sheriff sold, not upon what he advertised;" and (p. 141) that "an omission by the sheriff to advertise does not affect the purchaser's title, though where it may appear that injury to the debtor, or to the execution creditor, has arisen from it, there may be a good cause of action against the sheriff."

In the case of *Paterson v. Todd* (1865), 24 U.C.R. 296, part of the head-note is in these words: "Errors or defects in the advertisements, either in the *Gazette* or local paper, of a sale of land under execution, will not affect the purchaser's title, even if he be one of the execution creditors." The advertisements there in question were required by statutory enactment.

In the case of *Lee v. Howes* (1870), 30 U.C.R. 292, it was again repeated: that the want of proper advertisements does not avoid a sheriff's sale under a *fi. fa.*

And in the case of *McDonald v. Cameron* (1867), 13 Gr. 84, the rule in equity, as well as at law, was thus expressed (p. 95): "At law it has been held in several cases that irregularities and defects in the form or publication of the advertisement, or in other matters preliminary to the sale, do not affect a purchaser who has paid his purchase-money and got his conveyance, whether he purchases at the sale, or subsequently from the execution creditor in case the latter was the sheriff's vendee. In all such cases the parties aggrieved are left to their action against the sheriff, if they suffer through any neglect of duty on his part. Similar principles have been acted on in equity; in the case of sales under decrees, and have also been recognised where the title depends in part on legal proceedings." See also *McGee v. Kane* (1887), 14 O.R. 226; and *McNichol v. McPherson* (1907), 15 O.L.R. 393.

The rule is said to be the same in the Courts of the United States of America: it is thus stated in the *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 25, p. 762: "The statutes regarding notice are generally construed as being merely directory, and a failure to give the notice prescribed, or a defect therein, does not invalidate the sale as to an innocent purchaser."

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.
CALDBICK
AND
PIERCE.
Meredith,
C.J.C.P.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.

CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

It is difficult to perceive how the rule could be otherwise if sheriffs' sales are to be effectual; few would give a full or fair price for a precarious title: few would attend such sales.

That the defendant Pierce was an innocent purchaser, within the meaning of the word "innocent" as applied to such a case as this, is really not questioned in any of the testimony adduced at the trial. He is a responsible lumberman, living in the district; and, like others of the district, he attended the sale. It is quite unlikely that he ever saw the sheriff's notice or advertisement of the sale: no one said that he had ever seen it; and he testified that he could not remember having ever seen it; but that he had heard persons talking about the coming sale and in that way learned of it; a very likely thing; a company of lumbermen carrying on business in the district for several years had failed and were about to be sold out by the sheriff: every one in the district concerned in lumbering would soon know of the failure and of the sale: he went to the place of sale on the day of the sale, arriving only two hours before the sale took place; and, as far as the evidence shews, up to the time of his arrival at the place of sale he had made no inquiries as to the property to be sold, but would know the character of it, knowing the business the company had been engaged in. His story is that after his arrival he made some inquiries, of some of the settlers living in the neighbourhood, as to the probable number of logs in the woods, and was told, indefinitely, a thousand or more. Being a lumberman, he was ready and willing to buy logs; and at a forced sale prices are low as a rule, it is an opportunity that buyers take in the hope of "getting a bargain." Upon the whole evidence, it seems to me to be plain that this lumberman did not "pin his faith" to any information obtained from settlers or from any one else, but did pin his faith to the knowledge and judgment of the local saw-miller, Thomas Leverson, who would be more likely than any one else to know the value of the "logs in the woods," as well as elsewhere, and who was a capable and canny man in lumbering transactions in the locality: as put by this defendant in his testimony at the trial, he felt that Mr. Leverson knew, because he lived there, and, as he was bidding, what "was good for him should be good enough for Charles Pierce;" and so this defendant outbid Leverson and bought the logs. But, after doing so, he

saw some of the officers of the company and suggested to them that they take back the property, and offered it to them at the price he was to pay the sheriff for it, but they would not take suggestion or offer; subsequently he offered them to another officer of the company, and he now offers them to the plaintiffs at the price he paid and his other outlay upon them. So that there seems to me to be no kind of doubt of this defendant's occupying, fairly, the position of an innocent purchaser, and being entitled to all the rights of such a purchaser.

Consequently, setting aside the sale, at the instance of either judgment debtors or judgment creditors, is out of the question, and so the trial Judge rightly considered.

But he also held that this defendant, "knowing the capacity in which the sheriff was acting, and that to sell 4,000 logs as 'about 300 logs' would be a breach of duty, and would operate as a fraud on the other creditors . . . he is liable with the sheriff for damages which the plaintiffs and the creditors have suffered" (39 O.L.R. at pp. 203, 204). In that I am quite unable to agree: and must, in the first place, point out that if it were so it would be good ground for setting aside the sale: fraud avoids all things, and more than takes away the character of innocent purchaser.

In fact, the sheriff did not sell about 300 logs, he advertised "about 300 logs in the woods:" he sold all the logs of the execution debtors in the woods, expressly stating that if less than 300 the purchaser must pay full price, if more the purchaser took them; he was to buy all the logs in the woods. Leverson, after going with the company's treasurer to the woods and being shewn the company's logs, made an estimation of the number then considered by him to be purchasable, in quality, and made that estimation for the purpose of bidding for the logs at the sheriff's sale, in the interests of the treasurer and of himself and of Mr. Edward Morgan of Toronto. He placed the number at about 1,000, excluding all dry logs because of their being worm-eaten and of the great danger to them of destruction by fire. Being a man most capable of making an estimation of the value of the logs, and having made it with a view to buying in his own interests as well as in the interests of the two other persons I have mentioned, who were associated with him in the venture,

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.

CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.

v.
CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

no one can say, reasonably, that the intended purchase was of 300 logs, or that it was of less than 1,000 green logs in the woods: nor, in the face of the testimony of Levenson, that the price which the logs brought was not a fair one for all the logs in the woods, having regard to the time of the year when sold; and, as that testimony is substantiated by the purchaser's conduct at the sale, and also as he has always been willing to give up his purchase, and still is, it does seem to me to be impossible to say that the property was sacrificed, or even that the sale was not a fair one. One should look at the transaction as of the day of the sale: the logs that were dry had not then escaped the year's dry weather fires: all the danger was then ahead; and at that time, according to the evidence, the only logs that were purchasable, and the value of which should be taken into account, were those of that year's cut—the green ones. That it was not a sale of 4,000 logs as 300, but was a sale of more than 1,000, the price paid makes plain: at the value of the logs in the woods named by the trial Judge, the number would be over 1,000; and that that value was much too high, Levenson, the most competent valuer, makes plain: at his price the number paid for would be about 1,660.

I am unable to perceive any kind of ground upon which the defendant Pierce can be held, rightly, to be answerable in damages to any party to this action.

Then is the sheriff answerable in damages to either judgment debtors or judgment creditors? For the reasons: that there is no evidence of any lack of buyers by reason of the description of the seventh item in the notice of sale as being "about 300 logs in the woods" instead of a greater quantity: nor was it likely that the notice would deter buyers, for the preceding item was one of "about 1,900 logs in the water," which there were not; and every one who knew anything about the sale knew that the company was being "sold up" by the sheriff; and that the evidence proves a well-attended and good sale: and also shews that a fair price, at the time of the sale, was obtained: my answer to this question would be, no, even if there were not other grounds upon which both plaintiffs must fail in this action: but, apart from such other grounds, the sheriff would no doubt escape—through good luck rather than good management. Standing by itself, the fact that about 4,000 logs were sold under an advertisement

of about 300 would indicate a great lack of that reasonable diligence and care which a sheriff should use in the exercise of the duties of his office in executing writs of *fi. fa.*: but circumstances alter cases; that which in some cases would be manifest negligence might in others be excusable. Special circumstances surround this case.

The district of Temiskaming is an enormous bailiwick, mainly of wild lands; and finding logs in the woods, especially unmarked logs, must be often a difficult and sometimes an impossible task; but reasonable diligence must be used; and it is possible, whether advisable or not I cannot tell, to sell all the logs in the woods at so much per thousand feet board measurement, or even so much per log, if their average dimensions are fairly well-known.

Some of the other special circumstances to which I have referred are these: first as to the execution debtors, the original plaintiffs in the action. The action seems really to have been brought by the treasurer, the witness Stein, to whom I have already referred in connection with the witnesses Leverson and Morgan: and when the sheriff, accompanied by the execution creditor Reamsbottom, and the Division Court bailiff and sheriff's officer Warren—also a witness at the trial—went to the company's place of business, to execute the writ of *fi. fa.*, they were informed by Stein, who was then in charge of the company's property there, that the company had no goods and chattels liable to execution; and, after a seizure of some goods and chattels had been made on the company's premises, and the sheriff and execution creditor had gone some miles further on to obtain information as to logs owned by the company, and had got the information and had returned, Stein, upon being interrogated again as to "logs in the woods," denied that there were any. Subsequently, Stein, Morgan, and Leverson, entered into an arrangement to buy at the sheriff's sale, Morgan to protect the property, as he had advanced money to the company through Stein, and all three to share in the profits of the purchase: Morgan to supply the money needed to make the purchase. With this object in view, Stein took Leverson to see and value the logs in the woods, and that was done. Leverson attended the sale to carry out this arrangement, and had full power to purchase as he saw fit: but the defendant Pierce outbid him, as I have stated; Leverson having

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.

CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.

CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

bid the "logs in the woods" up to the highest amount which in his judgment should be paid for them. Stein did not attend the sale because Levenson was acting for him, as well as for Morgan, with full power, as I have said, in his discretion, to buy for them. The president and vice-president of the company both attended the sale: but neither then, nor at any other time, until some time after the sale, did the company, or any one in their behalf, make any kind of objection to the sale, or the notice of it, or to anything else in connection with it: and, as I have said, the purchaser's advice to the officers of the company, and his offers to them, that they take over his purchase, were rejected.

In these circumstances, how can these plaintiffs, with any degree of reason, seek damages from either of the defendants? They were silent when they should have spoken, and when speaking would have promptly cured all they now complain of, or, perhaps more accurately speaking, Stein complains of, and they should be silent now, also, to be reasonable or fair: that is, silent on the subject of claims for damages, which, had they really sustained any, would have been sustained largely through their own false statements, and certainly could not have been sustained if Stein, when he chose to speak, had told the truth, instead of an untruth, as to the company's goods and chattels.

There was a sharp conflict of testimony between the witnesses Morgan and Stein, on the one side, and the sheriff, upon the other, the former asserting and the latter emphatically denying that he told them, a few days before the sale, that he intended to sell only 300 logs in the woods, that he had advertised for sale that number only, and so could not sell more. The question on which side the truth was in this conflict of testimony was much discussed upon the argument of this appeal, though, as affecting the rights of the parties to this action, it is really a question of no consequence: the only injurious effect the statement, if made, could have had, would have been the possible loss of Morgan and Stein as bidders at the sale, but there was no such loss, they were actively there and bid for all the logs in the woods up to within \$5 of the price at which the defendant Pierce bought them, that is, were actively there and so bid through their partner, the witness Levenson, acting for the three of them. And all the circumstances point to a better memory of the sheriff than of the

witness Morgan—Stein's testimony cannot at all be depended upon—and, accordingly, if it were necessary to answer the question, I should be obliged to answer it in favour of the better memory of the sheriff. In the first place, he could not accurately have said that he could not sell more than 300, as he had advertised that number only; he had intended to seize and sell all the goods and chattels of the execution debtors: neither he nor any one else had any idea of leaving any logs not seized or not sold: what was intended to be sold was all the logs in the woods belonging to the execution debtors, but all concerned in seizing and selling were misinformed as to the number: but, apart from that, the facts proved by the witness Levenson, and admitted by the witness Morgan, that Levenson, representing him, went to the woods with Stein, just before the day of the sale, to see all the logs and to put a value upon them for the purpose of bidding upon them at the sale, and did accordingly put such value on them and did so bid, put it beyond question that neither Morgan nor Stein was misled, or could have been under any impression that 300 only were to be sold.

And, second, as to the execution creditors: though the case is not so flagrant an one on their part as that of the execution debtors on their part is, it is quite enough to prevent them reasonably charging the sheriff with actionable negligence in the performance of any duty he owed to them.

They are general country storekeepers, living in the district, dealing in other ways also among the lumbermen, miners, and settlers there, and so more in touch with all men in the district than most men living and carrying on business there.

When the seizure was to be made, the senior member of the firm went with the sheriff, who also took with him, as his officer, the Division Court bailiff of the district; and this execution creditor took really the prominent part in the proceedings. They went to the company's place of business, and were told by the witness Stein, as I have already mentioned, that there was nothing that could be seized: the seizure of the goods there was then made, and is thus described by this execution creditor in his testimony at the trial:—

“Q. Then you went, and what did you do first in the way of seizure. A. I think we seized the horses.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.

v.
CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.

v.
CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

"Q. I suppose you wanted to make the best seizure and sale there could be and get your money? A. Yes.

"Q. What did you ask the sheriff to do to ascertain whether there was any other logs than those in the boom? A. I think I made the suggestion we would go to Paul Bertrand's.

"Q. Had you known Bertrand? A. Yes.

"Q. Had he been dealing with you? A. Yes.

"Q. Is he a respectable man? A. Apparently he is.

"Q. You thought he would be able to give information? A. Well, he should know something about it because he lived about two miles and a half from the logs at the south-east corner of Barber's Bay.

"Q. Had he been resident there for long? A. Three or four years.

"Q. And you did go to Bertrand's? A. Yes.

"Q. And what did he tell you and the sheriff? A. He told us there was around 300 logs, I am not sure whether he said 300 or 400, somewhere around there.

"Q. Where? A. In the bush.

"Q. Then I suppose the sheriff put that down? A. Yes.

"Q. And that was put in the advertisement? A. Yes.

"Q. About 300 logs? A. Yes. About 300 logs in the bush.

"Q. Did the sheriff afterwards speak to Stein again after that seizure? A. I think he did.

"Q. What did he ask Stein? A. I think he asked him if there was anything more to seize around.

"Q. Any logs? A. I don't remember whether he said logs or what he said.

"Q. Did Stein say there were no logs of the Maple Leaf Company to seize? A. I don't know that he mentioned logs; he said there was not anything of the Maple Leaf Company to seize.

"Q. At the first? A. I think he said there was not any logs."

The sheriff's story, which is not contradicted in any respect, is: that this execution creditor said that he could find out from Bertrand how many logs the execution debtors had; and that they two, and the bailiff, went and saw Bertrand, who told them that the logs in the boom behind the island belonged to the execution debtors, and that they also had about 300 logs in the

woods; that they talked about the logs in the woods, and, after that, this execution creditor and he decided to put them down in the bill: that, after that, he went back, in company with the other two, to the execution debtors' place of business and saw Stein again, and asked him how many logs there were in the woods, and he answered that the execution debtors had no logs in the woods, to which the sheriff replied that he was seizing what they had anyway.

Then this execution creditor—who, among other occupations, is an active lumberman—attended the sheriff's sale; and, knowing all that was done, from first to last, made no kind of objection, but took the active part I have mentioned in the doing of those things which are now complained of as actionable negligence; he himself being really answerable for the mistake as to the number of logs in the woods; the information got from Bertrand, not only being accepted by him, but he really vouching for it, as well as being the means through which it was sought and obtained.

I cannot find, nor can I at all think, that the sale was at all a less favourable one than if no mistake had been made: Morgan, Stein, and Levenson, knew the truth: Levenson, the most capable man, bid the logs up to an amount that he considered all they were worth: the purchaser, from the first, was and still is willing to let those most concerned take his place; and Levenson, the only man who had full opportunity for inspecting and estimating the value of all the logs before the sale, still says that a fair price was paid for them at the sale, the purchaser buying at the most unfavourable time of the year and taking the great risk of loss by forest-fires. And, I need hardly add, the onus of proof of actual loss, by the plaintiffs, is upon them.

But, if that were not so, it plainly does not lie in the mouths of either execution debtors—if really suing—or of execution creditors, to complain of any of the things with which they now find fault.

Accordingly, I would allow the appeal of the defendant Pierce and dismiss the action as against him, both with costs; and would also allow the appeal of the sheriff with costs; and dismiss the action as against him without costs; without costs because of the loose method in which his duties were performed, a manner

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.

CALDBICK
AND
PIERCE.

Meredith,
C.J.C.P.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.

v.

CALDBICK
AND
PIERCE.

Hodgins, J.A.

which should have no place in a sheriff's office: and would dismiss any cross-appeal with costs, if any.

LENNOX, J., agreed with the Chief Justice.

HODGINS, J.A.:—I cannot see that the sheriff in this case is guilty of negligence such as has produced damage to any party suing. Actual damage must be proved. This is the fundamental rule as stated by Cockburn, C.J., in *Stimson v. Farnham* (1871), L.R. 7 Q.B. 175. If not shewn, the plaintiff is not even entitled to a verdict for nominal damages: *Hobson v. Thelluson* (1867), L.R. 2 Q.B. 642.

It is not possible to scour the woods and depend on sight alone to determine the ownership of logs, unless they are marked or otherwise identified. These logs were unmarked, and the sheriff could ascertain what there was only by asking, unless it be his duty to cruise the woods and then endeavour afterwards to identify by inquiry those belonging to the execution debtor. The natural avenues for inquiries were the debtor company and settlers or others in the neighbourhood. Stein, for the company, denied that the company owned any logs. The sheriff adopted the execution creditor's suggestion and interviewed Bertrand, ascertaining what he knew. The liability of a sheriff, in the absence of direct notice to him or of knowledge in him of goods liable to be seized, depends upon the want of reasonable diligence: *Darling v. Corbett* (1851), 8 U.C.R. 72.

It hardly lies in the mouth of the company or the execution creditors to complain of neglect of duty, in that the sheriff did not see and advertise unidentified logs in the bush, the ownership of which the company disclaimed and of the existence of which the execution creditors never learned, although doing their best to ascertain for themselves. Those who attended the sale knew more than the sheriff and made their bids on the basis of that knowledge; not the sheriff's advertisement.

I admit the force of the contention that the sheriff's duty is not necessarily to be measured by the activity or knowledge of others who, while interested, have no such duty to perform. But, when these claim damages for his failure to do what they contend he might have done, it is surely a good answer to say to those

most interested that they at least had the information which he lacked, and acted upon it, and have in consequence lost nothing by his omission, and, as to those who lacked this knowledge, that the sheriff's ignorance was well answered by the bids of those who had seen and estimated the logs.

The duties of sheriffs in the northern parts of this Province ought to be reasonably viewed. And the evidence at the trial indicates that fair value was obtained for the logs, the number of which was in a general way well known to the audience at the sale.

The offer of Pierce to the company at the time and his subsequent willingness to turn over his bargain, which no one would take off his hands, suggests that the action of the sheriff caused no appreciable damage to any one concerned. I would dispose of the appeals and cross-appeals and the action as indicated in the judgment of my Lord the Chief Justice of the Common Pleas.

RIDDELL, J.:—Messrs. Reamsbottom and Edwards, having a judgment against the Maple Leaf Lumber Company, placed a *fi. fa.* in the hands of the sheriff of the district—the sheriff, under this execution, sold certain logs to Pierce; the Maple Leaf Lumber Company, claiming that the sale was invalid, sued both the sheriff (Caldbick) and Pierce, to have it declared that the sale was void and for incidental and consequent relief.

For some reason, and by a practice which I do not affect to understand, “Reamsbottom and Edwards, suing on behalf of themselves and all other creditors of the plaintiff company,” were added as parties defendants by order of the Master in Chambers: and Caldbick was made a third party and he and Pierce third parties.

It is obvious, from what took place at the trial and before us, that the Maple Leaf Lumber Company were suing to set aside the sale on their own behalf, and that Reamsbottom and Edwards were also suing for the same relief. However irregular this may be, all the parties being before the Court, the learned trial Judge acted properly and wisely in directing any necessary amendment of the pleadings, etc., and in disposing of the whole matter in this proceeding.

At the trial before Mr. Justice Clute at Toronto, judgment was given affirming the sale, but giving the plaintiffs damages against the sheriff (Caldbick) and Pierce, with a reference to the Master

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.

v.

CALDBICK
AND
PIERCE.

Hodgins, J.A.

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.
CALDBICK
AND
PIERCE.
Riddell, J.

to determine the amount. Reamsbottom and Edwards were held not entitled to damages against the sheriff or Pierce—and Pierce not entitled to relief over against the sheriff.

The sheriff and Pierce now both appeal against the plaintiffs and Reamsbottom and Edwards; and also Pierce, against the sheriff.

The sheriff, upon receiving the writ of execution, went to the premises of the plaintiffs to make inquiry as to the goods exigible. This was in a back township, difficult to reach, and with no roads, &c., for getting about. The sheriff went to the “shack” with Max Stein, the treasurer and manager of the company, who had met him on the train: he asked Stein if he had anything there to seize, and he said he had not. The sheriff was not deceived: he seized some horses. Stein also said there were no logs of the company: but the sheriff was not deceived by that claim, he knew there were some logs he could seize. Reamsbottom, who was with the sheriff, told the sheriff that “he” (R.) “could find out from Bertrand how many logs the Maple Leaf Company had.” Reamsbottom and the sheriff went to Bertrand, who was a settler in the neighbourhood, and Bertrand said that the company had “about 300 logs in the woods.” No further inquiry was made; Reamsbottom and the sheriff both believed Bertrand, and “we decided to put them down in the bill.” The country was rough, and further investigation would be a troublesome matter, but by no means impossible. I agree with the learned trial Judge that the sheriff was derelict in his duty in not making more exhaustive inquiry. The sheriff advertised “about 300 logs in the woods”—and he believed till after the sale that that was about the amount.

At the sale, the sheriff was asked as to the number in the woods, and he said he was selling whatever the Maple Leaf Lumber Company had there in the woods—300 more or less. If there were less, the buyer would pay for 300; if more, he would get them; and, on this understanding by the bidders, the defendant Pierce became the purchaser, at a price which would be about right for 300 logs, but much too small for 4,000, which was the actual number.

Pierce knew there were many more than 300—he “had an idea there were several thousand,” “over a thousand in the

bush;" and he swears that, if the sheriff had not said that he was selling all the logs of the company in the woods, they would not have been sold.

Before the sale was made, Pierce offered to buy in for the company, but his suggestion was not acceded to: after the sale, he offered the company to give them the logs if they paid him his money—this offer was apparently accepted, but the money was not paid, and the deal went off.

The plaintiffs claim that the sale is void, and cite the Irish case of *Edge v. Cavanagh*, 24 L.R. Ir. 1, where an interest in land worth £600 was sold for £5. The head-note says: "The Court set aside the sale and conveyance, on the ground that the sheriff did not take reasonable and proper care to advertise the sale, and that the farm was sold at an undervalue;" but a perusal of the case shews that the real ground was that there was not a real sale at all. Andrews, J. (p. 5): "I cannot regard the sale which took place as a real sale at all. It is not a case in which an independent third person purchased. The so-called sale was made to the plaintiff's agent at a gross undervalue, without any reasonable effort to obtain some approach to the real value; and although the summary jurisdiction I am called upon to exercise should be exercised with great caution, I am clearly of opinion that this sale ought to be set aside." This case of collusion between sheriff and execution creditor has no bearing on the present case, where fraud is not charged—counsel at the trial repudiated any charge of fraud.

The Irish case is not unlike our own case of *Campbell v. Smith* (1863), 10 Gr. 206, where the sheriff knocked down land to one P., who was really the bailiff of the sheriff, and who affected to buy at a price which was "a sacrifice of the land." The execution debtor obtained a decree for the conveyance to him of the land so sold.

I do not think the alleged undervalue can void the sale.

In *Laing v. Mathews* (1867), 14 Gr. 36, it was laid down that inadequacy of price, sufficient to set aside a conveyance as between private individuals, will not serve as a ground for setting aside a sale by a sheriff under execution: and the real principle is implicitly laid down, that to void a sale for such a reason the purchaser must have seen, from the amount paid, that there was fraud in the sheriff or official misconduct (p. 40).

App. Div.
1917

MAPLE
LEAF
LUMBER
CO.

v.
CALDBICK
AND
PIERCE.

Riddell,

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.

CALDBICK
AND
PIERCE.
Riddell, J.

The same rule in effect applies to all irregularities on the part of the sheriff: *McDonald v. Cameron* (1867), 13 Gr. 84.

As to the particular irregularity complained of, viz., the advertisement, we have a number of cases in our own Courts, some of which I cite.

"Neglect on the part of the sheriff to advertise the property sold would not defeat the vendee's title:" *Doe d. Moffat v. Hall* (1827), Tay. 510.

"Any want of regularity in giving public notice of an adjourned sale under a *fi. fa.* will not invalidate the sale, where the debtor attended the sale, by his agent, and afterwards ratified what had been done:" *Doe d. Dissett v. McLeod* (1847), 3 U.C.R. 297.

The omission to advertise at all where there is no uncertainty as to what has been sold does not invalidate the sale though it may give a right of action against the sheriff: *Osborne v. Kerr*, 17 U.C.R. 134, 141; *Lee v. Howes*, 30 U.C.R. 292.

"Errors or defects in the advertisements, either in the *Gazette* or local paper, of a sale of land under execution, will not affect the purchaser's title:" *Paterson v. Todd*, 24 U.C.R. 296.

In view of such cases, I think Mr. Justice Clute right in deciding that the sale was not void. I do not think that Rule 557 is more than directory: and it follows that, in my view, *McLaughlin Automatic Air Brake Co. v. Allan* (1904), 4 O.W.R. 67, cannot be supported to the full extent.

From this finding I think it necessarily follows that the defendant Pierce is relieved of liability: he had a right to make a good bargain, and there is nothing to shew that he knew of any breach of duty on the part of the sheriff.

I would allow Pierce's appeal—and, in view of his offers before and after the sale, he should have his costs throughout.

The sheriff is differently situated: it was his duty to both creditors and debtors to make all he reasonably could out of the goods under his writ.

It is said that the company should not succeed because they asserted that there was nothing to seize: but the sheriff was not misled, and he did seize—so that misrepresentation cannot, I think, save the sheriff.

Nor can I find any conduct by way of estoppel proved. Stein,

who knew something of the number of logs, is not shewn to have been at the sale, and the sheriff had previously informed him that he could sell only the 300 logs advertised: while the Midaniks, who, we are told, are the parties most interested, and who seem to be shareholders in the plaintiffs' company, although at the sale, are not shewn to have known anything about the number of logs.

I think the sheriff is liable to these plaintiffs for the damages they have sustained from his omission to perform his duty in the premises.

As to Reamsbottom and Edwards, I cannot see that the conduct of Reamsbottom operates to bar their claim. While it is often to the advantage of the execution creditor to point out the goods to be seized, there is no legal obligation to do so—it is for the sheriff to make due inquiry himself: *Hutchings v. Ruttan* (1857), 6 U.C.C.P. 452; and I think Reamsbottom had the right to expect that the sheriff, before he sold, would satisfy himself of the approximate quantity he was to sell.

Even if Reamsbottom himself thought the sheriff's inquiry sufficient, it does not determine his legal right—he is entitled to reasonable care and diligence, not simply what he thinks is reasonable care and diligence—and I think that here there was not reasonable care and diligence.

In my opinion, the judgment should be set aside, and judgment entered declaring the plaintiffs and Reamsbottom and Edwards, suing, etc., entitled to damages against the sheriff for neglect of duty, with a reference to the Master to determine these damages; that the amount of such damages should be treated as assets from the sale in the sheriff's hands, and divided accordingly amongst the creditors entitled, the balance to be paid to the plaintiffs (the sheriff not to be entitled to fees on this sum); the sheriff to pay all the costs thus far of the plaintiffs and Reamsbottom and Edwards, and the costs of Pierce to be paid by the plaintiffs and Reamsbottom and Edwards.

The costs in the Master's office should be in the discretion of the Master.

Had I found that the sale was void for irregularity on the part of the sheriff, I should have considered that Pierce had a

App. Div.
1917

MAPLE
LEAF
LUMBER
Co.
v.

CALDBICK
AND
PIERCE.

Riddell, J.

App. Div.

1917

MAPLE
LEAF
LUMBER
Co.

v.

CALDBICK
AND
PIERCE.

remedy over against him: Rule 165; *Confederation Life Association v. Labatt* (No. 2) (1898), 18 P.R. 266.

ROSE, J., agreed with RIDDELL, J.

*Judgment as stated by the Chief Justice; RIDDELL and
ROSE, JJ., dissenting in part.*

1916

[IN CHAMBERS.]

Oct. 10.

RE NASH AND CANADIAN ORDER OF CHOSEN FRIENDS.

Insurance (Life)—Beneficiary Confined in Hospital for Insane—Order for Payment of Insurance Moneys by Insurers to Inspector of Prisons and Public Charities—Hospitals for the Insane Act, R.S.O. 1914, ch. 295, sec. 36—Insurance Act, R.S.O. 1914, ch. 183, sec. 176—4 Geo. V. ch. 30, sec. 10.

The provisions of sec. 36 of the Hospitals for the Insane Act override *pro tanto* those of sec. 176 (2) of the Ontario Insurance Act, as enacted by 4 Geo. V. ch. 30, sec. 10.

An order was made for payment to the Inspector of Prisons and Public Charities, instead of into Court, of insurance moneys to which an insane person, confined in a public hospital for the insane, was entitled.

MOTION by the Inspector of Prisons and Public Charities for an order directing the Canadian Order of Chosen Friends to pay to him the proceeds of an insurance upon the life of William Nash, deceased.

October 7, 1916. The motion was heard by RIDDELL, J., in Chambers.

K. W. Wright, for the applicant.

Lyman Lee, for the society.

October 10, 1916. RIDDELL, J.:—The late William Nash in 1895 became a member of the Canadian Order of Chosen Friends: he took out an insurance certificate for \$1,000, payable to his wife, Emma Nash. William Nash died on the 25th March, 1916, in good standing in the Order, whereby Emma Nash became entitled to the insurance money, some \$750 odd.

She, however, had become insane, and in the previous September had been admitted to the Hospital for the Insane at Hamilton, being still there at the time of this application.

William Nash having died intestate, letters of administration were granted to Mr. Dunlop, Inspector of Prisons and Public Charities.

The Inspector applies for payment to him of the proceeds of this policy: the Order opposes the motion, and desires to pay the sum into Court.

I think the provisions of the Hospitals for the Insane Act, R.S.O. 1914, ch. 295, sec. 36, override *pro tanto* those of the Insurance Act, R.S.O. 1914, ch. 183, sec. 176; 4 Geo. V. ch. 30, sec. 10,* and that the money should be paid to the Inspector.

Order accordingly.

*Section 36 of the Hospitals for the Insane Act is in part as follows:—

36.—(1) If a patient, upon or at any time after his admission into a hospital or sanitarium for mental diseases, is possessed of or entitled to any property out of which the expenses of his maintenance in the hospital or sanitarium or any part thereof can be paid, and has no guardian or committee lawfully appointed to take the care or management of it, and any sum due for the maintenance of the patient in the hospital is not paid on demand, or there is no one of whom it can be demanded, and such property, in the opinion of the Inspector, is more than sufficient or is not required to maintain the family, if any, of the patient, the Inspector may take possession of such property or of so much of it as he deems necessary to pay or to secure the payment of the sum due or to become due for the maintenance of the patient in the hospital, and he shall have full power over and be competent to manage and appropriate, take or recover possession of, lease, mortgage, sell and convey all or any part of such property in the name of the patient, or as his committee under this Act, as fully and effectually to all intents and purposes as the patient could or might if of full age and of sound and disposing mind . . .

(2) The Inspector may exercise the powers conferred by this section notwithstanding that the property of the patient is not more than sufficient to maintain his family and that by reason thereof it is not intended to require payment for the maintenance of the patient.

By sec. 10 of the Ontario Insurance Amendment Act, 1914, 4 Geo. V. ch. 30, sec. 176 of the Insurance Act, R.S.O. 1914, ch. 183, is repealed and a new section substituted, sub-sec. (2) of which is as follows:—

(2) If there is no person who is at the time of the maturity of the contract competent to receive the share of an infant or a lunatic or a person whose place of abode is unknown, and the insurer admits the claim or any part of it, he shall pay such share into the Supreme Court to the credit of such infant, lunatic or person, and such payment shall be a sufficient discharge of the insurer for the money paid, and the money shall be dealt with as the Court may direct.

Riddell, J.

1916

RE
NASH
AND
CANADIAN
ORDER
OF
CHOSEN
FRIENDS.

1917

[BRITTON, J.]

Oct. 27.

MALDOVER v. NORWICH UNION FIRE INSURANCE CO.

Insurance (Fire)—Chattels Owned by Different Members of one Family—Insurance in Name of one—"Insurable Interest"—"Direct Loss"—Right to Recover for Whole Damage—Proofs of Loss—Time of Delivery—Post-letter—Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194, conditions 18, 22—Time when Loss Payable—Commencement of 60-Day Period—Action not Prematurely Brought—Non-compliance with Conditions as to Proof—Relief under sec. 199.

Upon a fire insurance policy issued by the defendants, insuring household furniture, "the property of the assured or of any member of the assured's family," contained in a certain dwelling-house, the plaintiff was held, to have "an insurable interest" and to be entitled to recover the whole amount of a loss by fire, notwithstanding that he owned only a part of the property insured; the remainder being owned by his father, mother, brothers and sisters, all living in the house as one family.

The words "direct loss," as used in an insurance contract, are not intended to exclude such a claim as the plaintiff's; they refer to the nature of the loss or damage—it must not be too remote.

Keefer v. Phoenix Insurance Co. of Hartford (1901), 31 S.C.R. 144, applied and followed.

Held, also, that the "proofs of loss" furnished by the plaintiff became the property of the defendants as soon as the letter containing them, addressed to the defendants, was posted (which was on the 8th January); that was a sufficient delivery of the proofs within the meaning of the statutory condition 18; and, therefore, the period of 60 days, allowed by statutory condition 22 for payment of the loss had expired on the 10th March, when the action was begun, and the action was not prematurely brought.

Held, also, that, if the conditions as to proof had not been strictly complied with, the plaintiff was entitled to relief under sec. 199 of the Ontario Insurance Act.

ACTION upon a policy of fire insurance.

The action was tried by BRITTON, J., without a jury, at Toronto.

Gideon Grant, for the plaintiff.

R. S. Robertson, for the defendants.

October 27. BRITTON, J.:—The plaintiff is a student-at-law, living with his family, consisting of his father, mother, brothers and sisters, at 11 Elm Grove avenue, in the city of Toronto.

The plaintiff alleges that he was the owner of certain of the goods and chattels mentioned in a policy issued by the defendants, and that different members of his family were the owners of the residue.

On or about the 20th June, 1916, the defendants, the Norwich

Union Fire Insurance Company, issued a policy for \$2,000 covering property described as follows:—

“HOUSEHOLD FURNITURE.

“\$2,000 on household and kitchen furniture, furnishings and utensils, useful and ornamental, beds, bedding, linen, carpets, curtains, rugs, pianoforte and other musical instruments, piano or organ stool and cover, sewing machines, family wearing apparel and material for same, uniforms, trunks, umbrellas, canes, valises, travelling equipments, plate, plated ware, china, glass and crockery ware, gas and electrical fixtures (when not insured by policy on the building); printed books and music, paintings, pictures, engravings and their frames (at not exceeding cost); furs, fire-arms and accoutrements, fishing tackle, bicycles, skates, stoves and ranges, bronzes, statuary, and other works of art, articles of *vertu*, mirrors, watches and jewellery in use, fuel and family stores and supplies, the property of the assured, or of any member of the assured's family, all only while contained in the 3-storey brick building with first-class roof, occupied as a dwelling-house, situate and being No. 11 Elm Grove avenue, Toronto, Ontario.”

The plaintiff alleges that the defendants, in consideration of the premium paid by the plaintiff to the defendants, and of the statements, representations, and warranties made by the assured, and of his being governed by the statutory conditions and the additions thereto and variations thereof, issued to the plaintiff a policy to cover loss or damage by fire to the property, or any part thereof, to the amount of not exceeding \$2,000, according to the terms and conditions of the said policy.

A fire occurred on the 25th November, 1916, by which the above-mentioned property was destroyed or damaged.

Notice of the said fire and of the said loss was promptly given by the plaintiff to the defendants.

On or about the 8th January, 1917, the defendants caused their appraiser or adjuster to investigate the cause and result of the said fire, and to report upon the said loss and make an adjustment of the amount owing to the plaintiff, if the defendants were liable.

Proofs of loss, in a form that appeared to be satisfactory to the said defendants, were furnished to them, and the adjuster

Britton, J.

1917

MALDOVER

v.

NORWICH
UNION
FIRE
INSURANCE
Co.

Britton, J.

1917

MALDOVER

v.

NORWICH

UNION

FIRE

INSURANCE

Co.

appointed by the defendants adjusted and determined the amount of the said loss at the sum of \$1,535.63.

The defendants refused and still refuse to pay to the plaintiff the amount of the said loss.

This action was commenced on the 10th March, 1917.

The defendants, by way of defence, set up that proofs of loss satisfactory to them had not been furnished, and that, if furnished at all, 60 days had not elapsed before the commencement of this action.*

What I regard as the main defence is, that the plaintiff personally did not suffer the loss and damage that he claims in this action, as he had not an insurable interest in the great bulk of the property destroyed, and that the damage or destruction of any of the articles that belonged to the other members of the family cannot be recovered for, by the plaintiff, in the absence of ownership or insurable interest.

In this case effect ought not to be given to the objection that the plaintiff failed to furnish and deliver proofs of loss as required by the 18th statutory condition.

The defendants sent in their appraiser; the plaintiff was led to believe that the only question was in regard to the amount of the damage or loss to the goods and chattels sued for. There was no request in writing for anything further from the plaintiff. It is true that the defendants' appraiser suggested that it would be better, and that he would like the plaintiff, to put in a list of the property he was interested in and personally owned—but this was apparently not insisted upon, and was treated by the plaintiff as something not actually required by the defendants. Then, after the proofs were put in by the plaintiff, no objection was taken by the defendants to them; in fact the defendants treated them as if they were not objectionable on any ground; and no further objection was in fact made till the defendants made it in their statement of defence.

*By statutory condition 18 (Insurance Act, R.S.O. 1914, ch. 183, sec. 194): "Any person entitled to make a claim under this policy shall (a) forthwith after loss give notice in writing to the company; (b) deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits;" Condition 22: "The loss shall be payable in 60 days after the completion of the proofs of loss, unless a shorter period is provided for by the contract of insurance."

The defendants disputed liability for almost the whole amount of the loss on the goods damaged or destroyed.

There is evidence that the proofs of loss were on hand in the defendants' possession on the 9th January—they were mailed on the 8th.

The proofs of loss became the property of the defendants as soon as the letter containing them was mailed; and I am of opinion, in the absence of any decision to the contrary, that that would be a sufficient delivery of proofs of loss within the meaning of condition 18.

In this case there is no dispute about the receipt of proofs; it was admitted that they were in the hands of the defendants on the 9th January.

It may be that sec. 199* of the Insurance Act, R.S.O. 1914, ch. 183, does not apply to a case where the objection is only as to the time within which the particulars were to be delivered; but, apart from this, the above is a section under which the plaintiff should be entitled to relief.

In this case there was no written application for insurance, the application was verbal, and, after negotiations and ascertaining what the plaintiff desired, the defendants were willing to issue the policy as it now appears.

It is perfectly clear, upon the evidence, that both the plaintiff and defendants thought they were insuring the whole of the property mentioned in the policy, the same as if actually owned by the plaintiff, and that, in the event of loss or damage by fire, the plaintiff would be entitled to recover the whole amount of loss up to \$2,000.

The words "direct loss" were not intended to apply in a case

Britton, J.

1917

MALDOVER
v.
NORWICH
UNION
FIRE
INSURANCE
Co.

*199. Where, by reason of necessity, accident or mistake, any condition of a policy of insurance on property in Ontario as to the proof to be given to the insurer after the occurrence of the event insured against has not been strictly complied with, or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any condition of such policy, the insurer . . . objects to the loss upon other grounds than for imperfect compliance with such condition or does not within a reasonable time after receiving such statement or proof notify the assured in writing that it is objected to, stating the particulars in which the same is alleged to be defective, and so from time to time, or where for any other reason it is held to be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such condition no objection to the sufficiency of such statement or proof . . . shall be allowed as a defence by the insurer or a discharge of his liability in such policy wherever entered into.

Britton, J.

1917

MALDOVER

v.

NORWICH

UNION

FIRE

INSURANCE

Co.

like the present—these words mean rather that the plaintiff is not entitled to damages which would be too remote to warrant recovery.

This property was treated as if it all belonged to a class, viz., the family of the plaintiff, such family consisting of relatives, as already stated.

The case of *Keefer v. Phœnix Insurance Co. of Hartford* (1901), 31 S.C.R. 144, is in point to this extent: "An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss though his interest may be limited if when he effected the insurance he intended to protect the interest of the vendee as well as his own.

"The fact that the vendor is not the sole owner need not be stated in the policy, nor disclosed to the insurer."

The plaintiff having intended to insure the whole of the property for the benefit of himself and family, and being himself owner of part of the property, and full disclosures having been made to the defendants, I am of opinion that the plaintiff has such an insurable interest as will entitle him to recover for the full amount of loss on the property mentioned in the policy.

He may be liable to the real owners for such a part of the loss as they or any of them may have sustained by the fire.

There will be judgment for the plaintiff for \$1,535.63 with interest at 5 per cent. per annum from the date of the writ of summons herein, and with costs.

1917

Nov. 1.

[MIDDLETON, J.]

UREN V. CONFEDERATION LIFE ASSOCIATION.

Mortgage—Power of Sale—Exercise of—Purchase by Second Mortgagee—Action to Set aside Sale—Notice of Sale actually Served but not on all Persons Interested—Right of Mortgagee to Stand on Provision for Sale without Notice—Abortive Auction-sale—Test of Value—Advertisement of Sale—Two Parcels Offered together—Bona Fides of Actual Sale—Evidence—Value of Land—Expert Testimony.

In an action by the assignee of the equity of redemption to set aside a sale of vacant land under the power of sale contained in the first mortgage, by the first mortgagee to the second mortgagee, it was held:—

- (1) That the right to sell, on three months' default, without notice, as stipulated for in the mortgage, was not lost by notice being given to some of those entitled to notice under an earlier provision in the mortgage by which the power of sale might be exercised after default for two months on 10 days' notice.

- (2) That, when the land, which consisted of two separated parcels, was offered for sale at public auction, each parcel should have been advertised and offered separately, instead of both together; but, as the land was not sold at the time that it was so offered, but later, the sale actually made must be dealt with, without regarding the attempted sale as any real test of the selling value of the property.
- (3) That, upon the evidence, the sale to the second mortgagee, by private contract, after the land had been offered at public auction, was a real sale, and free from any taint or suspicion of wrongdoing.
- (4) That, considering all the circumstances, the sale at \$350 a foot was not a sale at an undervalue, though there was expert evidence that the land was worth \$400 a foot.

Remarks upon the weight of expert testimony as to the value of land.

ACTION to set aside a sale by the defendant association to the defendant Harris, under a power of sale contained in a mortgage to the association, of a part of the mortgaged land in which the plaintiff had an interest, and for damages.

October 24 and 25. The action was tried by MIDDLETON, J., without a jury, at Toronto.

Shirley Denison, K.C., for the plaintiff.

G. H. Kilmer, K.C., for the defendants.

November 1. MIDDLETON, J.:—Samuel Harris was the owner of a parcel of land on the north side of Wellington Place, having a frontage of 180 feet by a depth of about 216 feet. There was upon the centre portion of the land a large house, and the readiness with which this could be adapted for factory purposes, when the neighbourhood ceased to be residential, no doubt suggested the division into three parcels, each having a frontage of 60 feet.

On the 16th July, 1914, Harris conveyed to one Hoffman.

On the 23rd July, 1914, Hoffman mortgaged to the Confederation Life Association to secure \$25,000.

On the 15th June, 1914, Hoffman gave a mortgage to Harris for \$34,500. This mortgage, though dated prior to the mortgage to the Confederation Life Association, was intended to be subject to it, and the Confederation Life Association's mortgage was registered prior to it.

On the 29th July, 1914, Hoffman conveyed the equity of redemption to Haley.

On the 11th August, 1915, Haley conveyed the equity of redemption to Uren.

The real situation was, that Hoffman was a mere trustee for

1917
—
UREN
v.
CONFED-
ERATION
LIFE
ASSOCIA-
TION.

Middleton, J.

1917

UREN

v.

CONFED-
ERATION
LIFE
ASSOCIA-
TION.

Uren and Haley, and that the deed was taken in his name to avoid either Uren or Haley entering into covenants upon the mortgages.

Haley, desiring to enter into the speculative purchase of this land, agreed with Uren, in consideration of an advance of \$3,000 on account of the purchase-price, to syndicate the property and repay Uren \$3,500 or sell and pay this sum and divide the profits—and, unless this was accomplished in 4 months, to convey to Uren absolutely. This is set forth in an agreement of the 20th August, 1914; and the conveyance of August, 1915, was made in pursuance of this earlier arrangement. Though, on the terms of the earlier agreement and after the conveyance, Haley had ceased to have any interest in the property, he continued to try to sell, expecting some grace from Uren, and Uren held out hope based upon “the true spirit and intent” of their former partnership.

In the month of January, 1915, Haley sold the middle 60 feet, with some rights of way, to a man named Yolles, at \$410 per foot. This included the old house, which was subsequently pulled down, and a large factory was erected by the Butterick Publishing Company—and this parcel was released from the two mortgages, which were reduced by the amounts paid as the result of the sale. Such releases were with the approval of Haley, who was then the registered owner.

The interest upon the Confederation Life Association mortgage was allowed to fall in arrear, and taxes were unpaid, and, as the land was vacant, this caused some anxiety on the part of the association; and, after some correspondence with Haley, who was still thought by the Confederation Life Association to be the owner of the equity of redemption, and with Harris, the second mortgagee, notice of intention to exercise the power of sale in the mortgage was given. This notice was given to Haley, but not to Uren, whose conveyance was overlooked by the solicitors when the search was made. Notice was given early in January, 1916.

The property was offered for sale in April, 1916, but was not sold, the reserved bid not having been reached.

After this, on the 10th May, 1916, the Confederation Life Association, in assumed compliance with the power of sale contained in their mortgage, conveyed the lands remaining under their mortgage, that is, roughly, the east 60 feet and the west 60 feet, to Harris, at \$350 per foot, or \$42,000 in all.

On the 3rd July, 1916, Harris conveyed the westerly 60 feet to Northrop & Lyman, at \$350 per foot.

Harris did not complete his purchase until he had arranged the sale to Northrop & Lyman, and all money received on this sale was paid on account of a mortgage he had given to the Confederation Life Association for the balance of his purchase-money, or upon his own mortgage, and the parcel sold was discharged from these mortgages.

Assuming the validity of all that had been done, this left the Confederation Life Association with a first mortgage upon the east 60 feet for \$8,250, and Harris the owner of the equity of redemption, and it also meant that Harris had received or was accountable, as the balance of his purchase-price, for enough to reduce the balance due him on his mortgage to about \$3,000; and, as Hoffman alone was liable for this, and he is of no substance, Harris would lose this sum.

Uren now brings this action, and presents several contentions, some of them resting upon matters not as yet discussed.

First, it is said that, the mortgagee having failed to give Uren notice of the intention to exercise the power of sale, the conveyance to Harris is bad.

As the Confederation Life Association and Harris are the only parties defendant to this action, and as others are now interested in the west 60 feet covered by the same conveyance, I would not deal with this in this action as constituted, were it not for a clear opinion adverse to this contention.

The mortgage contains the statutory power of sale to be exercised after default for two months on 10 days' notice. If this were the only right given, the power was not well exercised, as notice should have been given to Uren; but the mortgage further provides that, upon default for three months, the mortgagee may exercise the power to lease or sell without giving any notice.

It is argued that the mortgagee is put to its election, and, having chosen to give notice, must, at its peril, give a valid notice. I do not agree. There is a power of sale, and it may be exercised upon the happening of either of two conditions precedent. Two months' default and notice, or three months' default without notice. The right to sell on three months' default without notice

Middleton, J.

1917

UREN

v.

CONFED-
ERATION
LIFE
ASSOCIA-
TION.

Middleton, J.

1917

UREN

v.

CONFED-
ERATION
LIFE
ASSOCIA-
TION.

is not lost by notice being given to some of those entitled to notice under the earlier provision. If notice should be given requiring payment within 10 days, even after three months' default, then the mortgagee would be precluded from selling within the time so given because it would be inconsistent with the notice he had given: *Stevens v. Theatres Limited*, [1903] 1 Ch. 857.

Second, complaint is made as to the way in which the auction-sale was advertised. Both parcels were put up together. It is easy to see how this arose. The whole 180 feet, except the centre 60 feet released, was offered. The better way would have been to have offered each parcel separately. It was not likely that any one seeking to build would want both, and at the time of the sale speculative purchasers had become rare birds, and no sale could have been expected save to some one actually intending to build.

The trouble from the plaintiff's standpoint is that my opinion in his favour does not help him, as the property was not then sold, but I must deal with the sale actually made, without regarding this sale as any real test of the selling value of the property.

Then the *third* contention is made, that there was not any actual exercise of the power of sale at all.

Some things were pointed out by Mr. Denison, in his careful and fair presentation of the case, that might be regarded as suspicious if suspicion had first been awakened, but which seem to me to be of no moment when I am entirely satisfied of the good faith of all concerned.

Mr. Harris asked Mr. Smith, the solicitor for the Confederation Life Association, to act for him, as he put it, "for economy's sake." The Confederation Life Association was in no peril, as its security was ample; and, while its objection to non-payment of interest, and to some \$1,343 taxes being allowed to fall into arrear, was most natural, it was plain that Harris or the Imperial Bank, to whom he had assigned his second mortgage, would in the end be compelled to pay to protect their much larger interest. Haley, who was thought to be the owner, was trying to sell at a price in excess of the mortgages, and was given time and failed. He then told the mortgagee he could do nothing and thanked it for its kindness in giving him the chance. The property was valued by the company's own valuator and by Mr. Pearson, an outside valuator of experience, at \$350 per foot—Mr. Pearson stating

this was the normal value and should be reduced 15 per cent. by reason of the war. The property was offered for sale in the unsatisfactory way described, and was unsold.

On the 1st May, 1916, Mr. Smith wrote a letter to Mr. Harris, upon which the whole argument is really based. After giving some information as to a statement enclosed of the amount in arrear on the Confederation Life Association's mortgage, he adds: "I understand that the association are willing to allow the first mortgage to stand if you carry it. I think it would probably be better for you, in order to secure yourself for payments made to carry the property, to get the conveyance under the power of sale and give back a new mortgage, to which the Imperial Bank's mortgage would be postponed."

"The conveyance" is probably a clerical error for "a conveyance."

At this time Mr. Smith thought he was acting for Mr. Harris. Mr. Harris, on the other hand, now says that Mr. Smith was not his solicitor. I do not regard this as a matter of any moment. Mr. Smith was giving advice to Mr. Harris as a client or as a friend or purely gratuitously, certainly not as in any way representing the Confederation Life Association. The expense of proceedings under the power of sale had been incurred, and the suggestion was, as the matter then stood, a reasonable one. If Harris bought the property from the mortgagee, his title was complete; if he paid the arrears on the mortgage, he would have to take proceedings upon his own mortgage to enable him to deal with the property, and this would be rendered the more difficult by reason of the hypothecation of that mortgage to the bank. There was not any idea of injuring the owner of the equity of redemption, as no one expected to realise enough to pay Harris in full.

Harris fell in with the suggestion, and the Confederation Life Association sold to him at the valuation \$350 per foot. This, I think, was a real sale, and free from any taint or suspicion of wrongdoing.

As Northrop & Lyman have become purchasers under this, there could not, at any rate in their absence, be a declaration affecting its validity.

The *last* contention is, that the sale was at an undervalue, and

Middleton, J.

1917

UREN

v.

CONFED-
ERATION
LIFE
ASSOCIA-
TION.

Middleton, J.

1917

UREN

v.

CONFED-
ERATION
LIFE
ASSOCIA-
TION.

that the association should be charged with a sum of at least \$400 per foot.

Evidence was given by an expert that, in his opinion, the land was worth this price. All opinion-evidence is subject to criticism, and the evidence of this expert might well be the subject of some comment; but, assuming that this is the opinion of a competent expert, it by no means follows that the sale made by the mortgagee is open to criticism. The land was vacant. It cost to carry, for interest and taxes, \$27.50 per foot per annum, for there was no revenue. Purchasers of such sites were limited in number, and very many factory-sites were in the market. A sale at \$350 per foot might well appear better than the chance of selling at a later date at \$400. If no sale at this figure could be made in two years' time, the carrying charges would more than absorb the difference. Then the association had the opinion of its own valuator, a man of great experience, fixing a value of \$350, and the further opinion of Mr. Pearson, a valuator of high repute, giving his view that this, by reason of the war, was 15 per cent. too high. These were the only opinions the association had, and they are at least entitled to as much weight as that of the expert now produced.

Then Mr. Harris was the man who was most concerned at the time, and, as he had owned the property before, he knew it and its prospects well, and he was content to sell to Northrop & Lyman at \$350, though this involved a loss to him.

I cannot see any foundation for any claim against the mortgagee upon this head.

In all cases of this type a high degree of caution is necessary, when the Court is asked to impose liability upon the strength of expert testimony: first, because the opinion of an expert, no matter how honest and no matter how competent, is as to the value of the land, and it by no means follows that land can be sold for that which the expert may fix as the value. If the expert had to face the problem of finding a purchaser within a reasonable time at that price, he would realise the difference; and, when the margin between the actual price and the theoretical value is not proportionately great, the carrying charges and agent's commission are factors that must not be ignored.

In the second place, all opinions of experts as to value reflect the idiosyncrasies of the witness. He may be an optimist or a

pessimist; his past experiences may have been fortunate or the reverse; he may be cautious or reckless. When the party or his solicitor seeks the aid of an expert, he is chosen from the large number ready for employment because his well-known tendency and past history point him out as one likely to aid the case. I do not mean that this is in any way improper or is any reflection upon the witness; it is only natural; but the Court must know, or it will soon learn, that it is just as easy to call just as many experts of the opposite tendency upon the opposite side. The real value is almost always somewhere between the extreme opinions expressed by honest expert witnesses. Further, no one can fail to observe the tendency of the expert to become zealous for his employer. This is generally unconscious, but the distortion of the evidence is almost always unmistakable. All that supports the client's case is seen and magnified, all that goes to destroy it remains unseen or is minimised and explained away.

The situation is very different when the expert is asked for his opinion under circumstances in which there is no inducement to swing one way or the other—and so an opinion given *ante litem motam* is entitled to greater weight.

Finally, the claim is made that there is still a right to redeem outstanding in the plaintiff. It is admitted that, if the sale to Harris stands, as I think it must, the fact that he was a second mortgagee does not prevent his setting up an absolute title. This claim, therefore, also fails, but it is not a matter of practical importance, as Mr. Harris, by his counsel, offered to sell the land now remaining for a sum that would clear him, and would probably accept considerably less.

In every aspect of the case the action fails.

Action dismissed with costs.

Middleton, J.

1917

UREN

v.

CONFED-
ERATION
LIFE
ASSOCIA-
TION.

1917

[MASTEN, J.]

Nov. 5.

CITY OF TORONTO V. QUEBEC BANK.

Assessment and Taxes—Business Tax—Bank Ceasing to Do Business in Municipality—Taxes Based on Assessment of Previous Year—Assessment Act sec. 95 (3) (7 Geo. V. ch. 45, sec. 9)—“Removal from Municipality of Person Assessed”—“Person”—Interpretation Act, sec. 29 (x)—Assessment Act, secs. 10, 56, 70, 95—Court of Revision—Power to Remit Taxes—Assessment Act, sec. 118 (1) (7 Geo. V. ch. 45, sec. 11).

In an action to recover from the defendant bank the amount of a tax known as “business tax” for the year 1917, levied by a by-law of the plaintiff city corporation passed on the 30th April, 1917, on the basis of an assessment made in 1916, it appeared that the defendant bank, on or before the 31st December, 1916, transferred its assets in the city to another bank, and had not done business in the city during 1917:—

Held, having regard to the provisions of secs. 10, 56, 70, and 95 of the Assessment Act, R.S.O. 1914, ch. 195, that the defendant bank was a “person” (Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (x)) who had removed from the municipality, and so came within the provisions of sub-sec. (3) of sec. 95 of the Assessment Act, added by 7 Geo. V. ch. 45, sec. 9, passed on the 12th April, 1917.

The power of the Court of Revision to remit the tax or any part thereof, under the provisions of sec. 118 (1) of the Assessment Act, as enacted by 7 Geo. V. ch. 45, sec. 11, was not affected by the decision.

MOTION by the Corporation of the City of Toronto, the plaintiff, for judgment on the pleadings, in an action to recover from the defendant bank the amount of a municipal tax known as “business tax” for the year 1917.

October 31. The motion was heard by MASTEN, J., in the Weekly Court at Toronto.

C. M. Colquhoun, for the plaintiff corporation.

Gideon Grant, for the defendant bank.

November 5. MASTEN, J.:—The action is brought to recover from the defendant the amount of a tax known as “business tax” for the year 1917. The defendant transferred its assets in the city of Toronto to the Royal Bank, on or before the 31st December, 1916, and has not done business in the city of Toronto during the year 1917, and claims that it is therefore not liable to pay this tax for that year.

Paragraphs 2, 3, and 4 of the statement of claim are as follows:—

“2. The defendant is a chartered banking corporation, and carried on a banking business, and for that purpose occupied and

used land in the city of Toronto during the year 1916, and until the end of that year, when it was amalgamated with another banking corporation, and ceased carrying on its said business in the city of Toronto.

"3. The plaintiff, in the year 1916, fully took and completed an assessment according to the terms of the said statute" (the Assessment Act) "and on the 30th April, 1917, passed a by-law, numbered 7801, adopting the said assessment as the assessment on which the taxes for the year 1917 should be raised, levied, and collected, and directing a levy and collection of taxes on the said assessment.

"4. The defendant was, by the said assessment, duly assessed in respect of its said business, and by the said by-law certain taxes were authorised to be levied upon and collected from the defendant in respect to the said assessment."

The statement of defence is as follows:—

"1. The defendant admits all the allegations contained in the plaintiff's statement of claim, with the exception of the allegations contained in the last two lines of the 2nd paragraph of the said statement of claim, and says that the assets of the said Quebec Bank were purchased by the Royal Bank of Canada, but the said Québec Bank was not amalgamated with the Royal Bank of Canada.

"2. The defendant says that it has paid all taxes, rates, and assessments levied or charged against it during the time that it was in business in the city of Toronto, and up to the 31st day of December, 1916, when the said bank sold to the Royal Bank of Canada all its assets in Ontario, and that it has not since the said date carried on any business whatever in Ontario.

"3. The said bank says that its head-office is in the city of Quebec, in the Province of Quebec, and denies that it is liable to the plaintiff for any taxes whatever."

The case was argued on the assumption that the facts are as stated in the defence.

The defendant took a preliminary objection that the application was premature, and relied upon sec. 118 (1) of the Assessment Act, R.S.O. 1914, ch. 195 (as enacted by sec. 11 of the Assessment Amendment Act, 1917, 7 Geo. V. ch. 45), whereby the Court of Revision is empowered to give a remission or reduction of taxes:

Masten, J.

1917

CITY OF
TORONTO

v.
QUEBEC
BANK.

Masten, J.

1917

CITY OF
TORONTO

v.

QUEBEC
BANK.

where the person who has been assessed for business has not carried on business for the whole year in which the assessment was made.

After hearing the argument on the preliminary objection, I arrived at the conclusion that the application to the Court of Revision was a proceeding independent of and unconnected with the present application, and that application might be made thereunder by the defendant, even though I found that the taxes were legally payable. I therefore overruled the preliminary objection.

Section 10 of the Assessment Act, R.S.O. 1914, ch. 195, provides:—

“Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called ‘Business Assessment’ to be computed by reference to the assessed value of the land so occupied or used by him as follows:— . . .

(c) Every person carrying on the business . . . of a bank or a banker. . . .”

The defendant occupied and used the land for the purpose of its business during the year 1916, and the assessment roll prepared and returned in that year properly included a business assessment of the defendant.

Section 56, after specifying the time for taking the assessment and revising the rolls, goes on to provide as follows: “the assessment so made and concluded may be adopted by the council of the following year as the assessment on which the rate of taxation for said following year shall be fixed and levied; and the taxes for such following year shall in such case be fixed and levied upon such assessment.”

The Corporation of the City of Toronto availed itself of this provision, and in the year 1917 adopted the assessment which had been made in the year 1916 as the basis for levying the rate in 1917.

Section 70 provides: “The roll, as finally passed by the Court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the Judge of the County Court, be valid, and bind all parties concerned, notwith-

standing any defect or error committed in or with regard to such roll," etc. And sec. 95 provides that the taxes payable by any person may be recovered as a debt due to the municipality; in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person shall be *prima facie* evidence of the debt.

The Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (x), provides that "'Person' shall include any body corporate or politic;" and sub-sec. (3) of sec. 95, added by 7 Geo. V. ch. 45, sec. 9, provides: "Subject to the provisions of section 118 every person assessed in respect of business or income upon any assessment roll which has been revised by the Court of Revision or County Judge shall be liable for any rates which may be levied upon such assessment roll *notwithstanding the death or the removal from the municipality of the person assessed* or that the assessment roll had not been adopted by the council of the municipality until the following year."

This amending Act came in force on the 12th April, 1917. The by-law levying the taxes in question was passed on the 30th April, 1917.

On behalf of the defendant it is argued that it does not come within the terms of this enactment, because it is alleged that it is not a person who has removed from the municipality, but that it has gone out of business entirely. In my view, this contention cannot be maintained. The defendant bank was admittedly in the city of Toronto during the year 1916, and was not there in the year 1917. It must, therefore, have removed from the municipality; and the word "person" includes a corporation. I am therefore of opinion that the case is covered by the provisions of the Assessment Amendment Act of 1917, as above quoted, and that the defendant is liable.

This disposes of the only question which is properly before the Court in the present action, but does not touch the question as to the power of the Court of Revision to remit the tax or any part thereof, under the provisions of sec. 118 (1) of the Assessment Act, as enacted by the amending Act, 7 Geo. V. ch. 45, sec. 11, and I designedly omit to express any opinion on the power or duty of the Court of Revision, if application is made under that section.

Let judgment be entered for the plaintiff for the amount of its claim with costs.

Masten, J.

1917

CITY OF
TORONTO
v.
QUEBEC
BANK.

1917

[IN CHAMBERS.]

Nov. 9.

APPELBE V. WINDSOR SECURITY CO. OF CANADA LIMITED.

Mortgage—Action for Foreclosure—Mortgage Made in 1915—Renewal or Extension of Mortgage Made in 1911—Interest and Taxes not in Arrear—Principal Overdue—Mortgagors and Purchasers Relief Act, 1915, sec. 2 (1)—Sec. 4, as Amended by 6 Geo. V. ch. 27, sec. 1—Action Begun without Leave—Dismissal—Refusal to Grant Leave nunc pro tunc—Discretion.

Upon the evidence, it was *held*, that a certain mortgage made in 1915, though in form a new mortgage, was in substance and fact an extension or renewal of a mortgage upon the same land, made in 1911, between different parties; and, being made for a term of less than three years, and at a higher rate of interest than that stipulated for in the original mortgage, it was not covered by the exception contained in sec. 4 of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, as amended in 1916 by 6 Geo. V. ch. 27, sec. 1; and the mortgagee was, therefore, subject to the condition imposed by sec. 2 (1) of the original Act, taxes and interest not being in arrear, of obtaining the leave of a Judge before beginning an action to enforce the mortgage.

And, where leave had not been obtained before an action for foreclosure was begun, the action was summarily dismissed by a Judge, who also refused to grant the leave *nunc pro tunc*, deeming that it was not a case in which he should exercise a discretion in favour of the mortgagee, if he had power to do so.

AN application by the defendants to dismiss the action, on the ground that it was brought without the leave of a Judge required by the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, sec. 2 (1).*

October 30. The application was heard by SUTHERLAND, J., in Chambers.

W. E. Raney, K.C., for the defendants.

A. W. Langmuir, for the plaintiff.

November 9. SUTHERLAND, J.:—On the 8th February, 1911, one Phyllis Rankin Davenport bought the lands in question, and executed a mortgage in favour of the vendor, Augustus Soper, thereon, to secure the unpaid purchase-money, namely, \$28,000, payable in five years from the said date, with interest half-yearly at 5 per cent. *per annum*.

*2.—(1) No person shall,—

(a) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of, any judgment or order of any Court, whether entered or made before or after the passing of this Act, for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the 4th day of August, 1914 . . . except by leave of a Judge granted upon application as hereinafter provided.

On the 18th June, 1913, Soper assigned the said mortgage to Joseph Appelbe, the plaintiff. Subsequently, in the year 1913, the said Phyllis Rankin Davenport sold the lands to one William McBain, who assumed the said mortgage, and subsequently transferred the lands, subject thereto, to the defendants, the Windsor Security Company of Canada Limited, in which company he is the largest shareholder. Subsequently the said company executed a mortgage in favour of the plaintiff, dated the 8th February, 1915, for \$28,025, payable at the expiration of two years, with interest half-yearly, at 7 per cent. *per annum*.

This action was begun in August, 1917, upon the last-mentioned mortgage, for foreclosure; at the date of the issue of the writ of summons, neither interest nor taxes were in arrear or unpaid. The principal money was all overdue.

The contention on the part of the defendants is, that, under the Mortgagors and Purchasers Relief Act, 1915, sec. 4, as amended by (1916) 6 Geo. V. ch. 27, sec. 1,* the mortgage in question is an extension or renewal of a mortgage made or entered into prior to the 4th August, 1914; that it expressly comes under the provisions of the said Act as so amended; and the plaintiff had no right to issue a writ for foreclosure in respect of the said mortgage, in the circumstances, without leave of a Judge, upon application previously made for that purpose.

The contention on the part of the plaintiff is, that the mortgage in question was not an extension or renewal of a previous mortgage, but a new mortgage, taken for a different amount, and covering also taxes paid by the plaintiff in respect of the lands covered by the mortgage, as well as the principal unpaid on the old mortgage and the interest thereon calculated to that date.

Upon the evidence it seems to me plain that, though in form a new one, the mortgage in question is in substance and fact an extension or renewal of the pre-existing mortgage, and, being made for a term of less than three years, and at a higher rate of interest than in the original mortgage, it is not covered by the

*Section 4, as amended, reads (in part): "4.—(1) Subject to the provisions hereinafter contained, sections 2 and 3 shall not apply to . . . any mortgage made or entered into after the 4th day of August, 1914, or to any extension or renewal made or entered into after the 4th day of August, 1914, of a mortgage made or entered into prior to that date where such extension or renewal is for not less than three years, and the rate of interest provided for in the original mortgage is not increased by such extension or renewal."

Sutherland, J.

1917

APPELBE
v.
WINDSOR
SECURITY
Co.
OF
CANADA
LIMITED.

Sutherland, J.

1917

APPELBE

v.

WINDSOR

SECURITY

Co.

OF

CANADA

LIMITED.

exception as it now appears in the amendment of 1916, and is therefore subject to the necessity imposed by the original Act on the part of the mortgagee, taxes and interest not being in arrear, of obtaining the leave of a Judge so to do before issuing his writ.

I was asked by counsel for the plaintiff to exercise an alleged discretion to grant the leave *nunc pro tunc*, in the circumstances, and confirm the proceedings thus far taken. Upon the material as a whole, I do not think, even if such discretion were clear, that I should exercise it.

An order will therefore go as asked, with costs.

[Upon appeal by the plaintiff, the order of SUTHERLAND, J., was reversed by the Second Divisional Court of the Appellate Division, on the 7th December, 1917. See note, 13 O.W.N. 239. The reasons for the decision of the Divisional Court will be reported in due course.]

1917

[MASTEN, J.]

Nov. 9.

RE CITY OF TORONTO AND GROSVENOR STREET PRESBYTERIAN CHURCH TRUSTEES.

Municipal Corporations—Expropriation of Land for Widening Highways—By-law—Award of Compensation to Land-owner—Repeal of By-law after Award—Right of Corporation to Desist—Municipal Act, sec. 347—Municipal Arbitrations Act, sec. 7—Effect as to Right of Desistment—Declaration in Expropriating By-law that Lands Form Part of Highways—Professed Authorisation of Use of Lands before Award—Conditions of sec. 347—Absence of Finding in Award that By-law not Acted upon—Refusal to Refer back Award for Amendment—Enforcement of Award.

A motion by the land-owners (claimants) to enforce an award of compensation for lands expropriated by the city corporation for the purpose of widening certain highways, was resisted by the corporation on the ground that the expropriating by-law had been repealed, and that the corporation had legally desisted, pursuant to the provisions of the Municipal Act, R.S.O. 1914, ch. 192, sec. 347:—

Held, that, in construing the provisions of sec. 7 of the Municipal Arbitrations Act, R.S.O. 1914, ch. 199, regard must be had to the purport of the whole Act; that that Act relates solely to the ascertainment of the *quantum* of compensation to which a claimant is entitled; and that sec. 7 must be construed as meaning that no appeal shall lie against the award unless the appeal is brought within six weeks, and not as declaring that, unless an appeal is so brought, the right of desistment lapses.

Held, however, that the expropriating by-law, which declared that the lands expropriated formed part of the highways, professed to authorise the use of the lands for the purpose of a highway, before the award; therefore the corporation had failed to bring itself within the conditions prescribed by sec. 347 of the Municipal Act (as amended by sec. 6 of 7 Geo. V. ch. 42); and the award was binding on the corporation and should be enforced.

Held, also, that the award should not be referred back to the arbitrator to be amended by adding a finding that the by-law had not been acted on. The claimants were, from the time the award was made, entitled to rely on the fact that the situation did not fall within the provisions of sec. 347.

NOTE: [1917] O.W.N. 239

MOTION by the trustees to enforce an award of compensation for lands expropriated by the Corporation of the City of Toronto.

The motion was heard by MASTEN, J., in the Weekly Court at Toronto.

J. A. Paterson, K.C., and W. N. Tilley, K.C., for the applicants.

Irving S. Fairty and C. M. Colquhoun, for the city corporation, respondent.

1917
RE
CITY OF
TORONTO
AND
GROSVENOR
STREET
PRESBY-
TERIAN
CHURCH
TRUSTEES.

November 9. MASTEN, J.:—The respondent corporation resists the motion on the ground that the by-law expropriating the lands in question has been repealed, and that the respondent corporation has legally desisted, pursuant to the provisions of the Municipal Act, R.S.O. 1914, ch. 192, sec. 347.

The facts are as follows:—

On the 6th January, 1914, the city council passed a by-law, known as number 6884, to extend Teraulay street northerly 86 feet wide to Grenville street, and to straighten and widen St. Vincent street, at its extension northerly to St. Mary street, to a width of 86 feet. In further pursuance of this purpose, the council, on the 23rd March, 1914, passed a further by-law, known as number 6927, for the purpose of expropriating thirteen different parcels of land, including among other the lands in question. This by-law, after describing the parcels, declares that they are thereby expropriated and taken for the extension of Teraulay street, the straightening and widening of St. Vincent street and its extension to St. Mary street, the widening of North street from Bloor street to Scollard street, and the widening of Ketchum avenue from Scollard street to Davenport road, and all the said lands are hereby declared to form part of the said highways.

On the 20th July, 1915, the present applicants, as trustees of the Grosvenor Street Church, gave notice to the Corporation of the City of Toronto to proceed with an arbitration to fix the value of that parcel of the said lands here in question, and thereafter proceedings were taken before P. H. Drayton, Esquire, K.C., Official Arbitrator, pursuant to the Municipal Act and to the Municipal Arbitrations Act, R.S.O. 1914, ch. 199, for determining the compensation to be paid to the applicants in respect to these lands.

On the 7th December, 1916, the Official Arbitrator made his

Masten, J.

1917

RE
CITY OF
TORONTO
AND
GROSVENOR
STREET
PRESBY-
TERIAN
CHURCH
TRUSTEES.

award, by which he did "order, award, adjudge, and determine that the Corporation of the City of Toronto pay to the claimants, the Grosvenor Street Presbyterian Church, the sum of \$57,500 in full compensation for the taking of their lands, buildings, and church-organ therein, with interest on the same from the date of their moving out and giving possession of the premises."

The award so made was duly filed, pursuant to the statute, and has not been moved against or appealed from, and the award has not been adopted by the council.

On the 14th May, 1917, the Council of the Corporation of the City of Toronto passed by-law number 7810, repealing by-laws numbers 6884 and 6927, respecting the extension of Teraulay street.

It is alleged on the part of the respondent, the city corporation, that the expropriating by-law did not authorise or profess to authorise any entry on or use to be made of the land before the award, except for the purpose of survey, or, in the alternative, that the arbitrator, by his award, has found that such authority, if given, was not acted upon, and consequently that, under sec. 347 of the Municipal Act, the award is not binding upon the corporation because it has not been adopted by by-law within three months after the making of the award. It is conceded that the award has not been adopted by the city council, and the respondent, the city corporation, by its counsel, offers and undertakes to pay to the applicants the damages, if any, sustained in consequence of the passing of the by-law and the solicitor and client costs of the arbitration.

The applicants, among other contentions made in reply to the city corporation's defence, submit that the rights of the parties in this case are governed by sec. 7 of the Municipal Arbitrations Act, and that the provisions of that Act, so far as they are in conflict with sec. 347 of the Municipal Act, are superior and govern.

Section 7 of the Municipal Arbitrations Act is as follows: "The award may be appealed against to a Divisional Court in the same manner as the decision of a Judge of the Supreme Court sitting in Court is appealed from, and shall be binding and conclusive upon all parties to the reference unless appealed from within six weeks after notice that it has been filed."

The applicants also refer to sec. 332 of the Municipal Act:

"The provisions of this Part" (Part XVI., which includes the provisions of sec. 347) "shall be subject to the Municipal Arbitrations Act." And they further submit that the award in question, which in terms directs "that the Corporation of the City of Toronto pay to the claimants, the Grosvenor Street Presbyterian Church, the sum of \$57,500," is binding and conclusive upon all parties to the reference, pursuant to the provisions of sec. 7 of the Municipal Arbitrations Act, above quoted.

On behalf of the respondent, the city corporation, it is said, in answer to this argument, that the Municipal Arbitrations Act relates only to procedure, and is concerned only with fixing the amount of the compensation to be awarded, and that sec. 7 is to be read as though it said that the award shall be binding and conclusive as to amount only upon all parties to the reference unless appealed from, etc.; that the award is one thing, but the obligation to pay in pursuance of it is another thing; that the right to desist given by sec. 347 is not taken away, even though the award is no longer capable of being appealed against; that the Official Arbitrator has no power effectively to order payment of the amount awarded or to take away from the municipality the right to desist.

In this connection it may be pointed out that, within the six weeks allowed by the statute, the award might be appealed against and the appeal dismissed; and in such case the words of sec. 7 would have no application; and, unless on other grounds, the right of desistment on the part of the corporation would ordinarily continue. But, if the award is appealed against and the appeal dismissed, the situation is in the result the same as if no appeal had been brought.

Suppose that two lots of land lying side by side are separately expropriated, and separate awards are made by the Official Arbitrator. The award on lot A is regularly appealed against and the appeal is dismissed. The award on lot B is not appealed against. Can it be supposed that, by force of sec. 7, the right of desistment is gone as to lot B, but continues as to lot A?

Such a construction of the statute ought not to be adopted unless the language clearly and imperatively demands it.

It is further to be observed that it would not appear to constitute a valid ground of appeal against an award that the corpora-

Masten, J.

1917

RE
CITY OF
TORONTO
AND
GROSVENOR
STREET
PRESBY-
TERIAN
CHURCH
TRUSTEES.

Masten, J.
1917
RE
CITY OF
TORONTO
AND
GROSVENOR
STREET
PRESBY-
TERIAN
CHURCH
TRUSTEES.

tion had in fact desisted or might desist. Such a contention rather falls to be urged in answer to a motion to enforce the award. This aspect of the matter appears to me to be pertinent as indicating that the right of appeal and the right to desist are separate and independent matters, having nothing to do with each other, and that sec. 7 ought to be construed in that point of view.

Upon the best consideration that I can give to the matter, I am, with some doubt, of the opinion that, in construing sec. 7 of the Municipal Arbitrations Act, regard must be had to the purport of the whole Act; that that Act relates solely to the ascertainment of the *quantum* of compensation to which the claimant is entitled; and that the section must be construed as meaning that no appeal shall lie against the award unless the appeal is brought within six weeks, and not as declaring that, unless an appeal is so brought, the right of desistment lapses.

This disposes of the first point argued on the part of the applicants.

The second point raised against the right of the city corporation to desist is, that this case does not fall within the provisions of sec. 347 of the Municipal Act.

The words of that section (as amended by (1917) 7 Geo. V. ch. 42, sec. 6) relevant to this argument are as follows: "Where the arbitration is as to compensation, if the expropriating by-law did not authorise or profess to authorise any entry on or use to be made of the land before the award, except for the purpose of survey, or if the by-law gave or professed to give such authority, but the arbitrators by their award find that it was not acted upon, the award shall not be binding on the corporation, unless it is adopted by by-law, within three months after the making of the award or after the determination of any appeal therefrom."

The present applicants, the church trustees, submit that the expropriating by-law does, in the present case, profess to authorise a use to be made of the land before the award; and, in support of that contention, they rely on the concluding words of the expropriating by-law, which, after describing the thirteen parcels proposed to be expropriated, including the lands in question, continues in these words: "be and the same are hereby expropriated and taken for the extension of Teraulay street; the straightening and widening of St. Vincent street, and its extension to St. Mary

street; the widening of North street from Bloor street to Scollard street; and the widening of Ketchum avenue from Scollard street to Davenport road; *and the same are hereby declared to form part of the said highways.*"

After the best consideration that I can give to the matter, I think that the words, "and the same are hereby declared to form part of the said highways," do profess to authorise the immediate use of the lands in question as a highway. It is unnecessary, in my view, to consider or determine whether such authorisation was legal or effective, much less to determine whether any legal title in the lands became by these words vested in the city corporation. It is sufficient that they profess to authorise the immediate use of the lands for the purpose of a highway.

The arbitrator has not by his award found that the by-law has not been acted on. Some suggestion was made that the arbitrator might now amend his award by so stating. That is a matter with which this Court has nothing to do on the present application. If it had, I do not think that an amendment should be facilitated. The applicants were, from the time the award was made, entitled to rely on the fact that the situation did not fall within the provisions of sec. 347.

The statute, in the public interest, gives to the corporation, as a local government body, a privilege and right entirely unusual, but it prescribes, as a condition precedent to the exercise of such right, certain conditions. The Court must, it seems to me, construe these statutory conditions strictly; and I am of opinion, for the reasons stated, that the respondent, the city corporation, has failed to bring itself within the conditions prescribed by sec. 347.

This suffices to dispose of the motion, and the further points argued on the motion need not be considered.

The motion to enforce the award is granted with costs.

[The order of MASTEN, J., was reversed by the Second Divisional Court of the Appellate Division, on the 21st December, 1917. See note, 13 O.W.N. 302. The reasons for the decision of the Divisional Court will be reported in due course.]

Masten, J.

1917

RE
CITY OF
TORONTO
AND
GROSVENOR
STREET
PRESBY-
TERIAN
CHURCH
TRUSTEES.

1917

[APPELLATE DIVISION.]

Nov. 12.

VANZANT v. COATES.

Gift—Parent and Child—Voluntary Conveyance of Land—Fiduciary Relation—Presumption of Undue Influence—Evidence—Onus—Findings of Trial Judge—Appeal.

The judgment of MULOCK, C.J.Ex., 39 O.L.R. 557, setting aside a conveyance of land made to the plaintiff by the mother of the plaintiff and the defendant, was affirmed.

Per FERGUSON, J.A.:—The equitable rule is, that if the party (donor) is in a situation in which he is not a free agent, and is not equal to protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so, because of their position. The application of the rule is not limited to any particular defined relationships or sets of circumstances. The question here was not whether the relationship of mother and daughter raised a presumption of undue influence, but whether the circumstances shewed that the plaintiff occupied a position of influence and that the mother (now deceased) was not a free agent, equal to protecting herself against the plaintiff's influence or domination, or that the plaintiff benefited or profited by her position. The circumstances were: the advanced age of the donor, her infirmity, her dependence on the donee; the position of influence occupied by the donee, her acts in procuring the drawing and execution of the deed; and the consequent complete change of a well-understood and defined purpose in reference to the disposition of the donor's property. In these circumstances, the onus was upon the plaintiff to prove by satisfactory evidence that the gift was a voluntary and deliberate act by a person mentally competent to know, and who did know, the nature and effect of the deed, and that it was not the result of undue influence. That onus had not been discharged; and it was unnecessary for the defendant to prove affirmatively that the influence possessed by the plaintiff had been unduly exercised.

Review of the authorities.

✓
APPEAL by the plaintiff from the judgment of MULOCK, C.J. Ex., 39 O.L.R. 557.

September 18. The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., LENNOX, J., and FERGUSON, J.A.

George Wilkie, for the appellant, referred to the circumstances in which the deed of the 6th October, 1915, was given, and argued that the learned trial Judge had proceeded upon a wong principle in setting it aside: he had based his view on *Allcard v. Skinner* (1887), 36 Ch.D. 145, a decision which proceeded upon other grounds than those applicable here. The distinction is illustrated by *Trusts and Guarantee Co. v. Hart* (1902), 32 S.C.R. 553, in which the Supreme Court of Canada affirmed the decision of the Court of Appeal in 2 O.L.R. 251, reversing the decision of a Divisional Court in 31 O.R. 414, and held that the presumption as to the effect of confidential relations

between donor and donee, in ordinary cases, does not apply so strongly to gifts from parent to child. That case was a stronger one in favour of the defendant than the case at bar: see Eversley on Domestic Relations, 2nd ed., p. 539; *Wycott v. Hartman* (1868), 14 Gr. 219; *Armstrong v. Armstrong* (1868), 14 Gr. 528, 535. [MEREDITH, C.J.O., referred to *Bank of Montreal v. Stuart*, [1911] A.C. 120.] That decision turned upon the conduct of the solicitor for the bank, and has no application to the present case. There is no evidence of undue influence or of importunity on the part of the plaintiff; her mother was a keen, shrewd business-woman.

Frank Arnoldi, K.C., for the defendant, the respondent, relied upon the principles stated and authorities cited by the learned trial Judge in his judgment. As to the defence of the Statute of Limitations, that is only pleaded by the defendant in order to defeat what he considers an unjust claim, in case the Court should hold in favour of the plaintiff's deed. The alleged distinction in favour of deeds from parent to child is not established by the English cases: see *Anderson v. Elsworth* (1861), 3 Giff. 154. Reference was also made to *Huguenin v. Baseley* (1807), 14 Ves. 273; *Phillipson v. Kerry* (1863), 32 Beav. 628; *McCaffrey v. McCaffrey* (1891), 18 A.R. 599.

Wilkie, in reply, argued that the defendant could acquire no title by possession in the circumstances of this case. Nor was there any definite promise in favour of the defendant such as could be enforced by specific performance.

November 12. The judgment of the Court was read by FERGUSON, J.A.:—This is an appeal by the plaintiff from a judgment of Mulock, C.J.Ex., dated the 26th May, 1917, whereby he dismissed the plaintiff's action for possession of the north half of lot 12, plan 115, registered in the registry office for the county of York, and also set aside the deed under which the plaintiff claimed title, bearing date the 6th October, 1915. The appellant questions some of the findings and conclusions of the learned Chief Justice, but with the following she does not quarrel:—

"The plaintiff and defendant are the sole children of Elizabeth Coates, deceased. The plaintiff, Frances Rebecca Vanzant, claims title under a deed bearing date the 6th October,

App. Div.
1917

VANZANT
v.
COATES.

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

1915, from Elizabeth Coates, her mother. The defendant, George Coates, on several grounds, denies the validity of this deed, and claims title under his mother's will and also by possession" (39 O.L.R. at p. 558).

In 1900 or 1901 Elizabeth Coates (being the owner of the whole of lot 12) told the defendant "that the north half was his; that he might move his house upon it and take possession; and that, acting on this permission, he did move his house upon the north half . . . and that he has ever since resided there and cultivated the land" (p. 559).

"On the 19th December, 1911, the mother executed her will, whereby she devised to the defendant the north half of the lot and to the plaintiff the south half" (p. 565).

"In 1914, the plaintiff began the erection of a house on the south half, and on the 31st August, 1914, her mother, Mrs. Coates, made a voluntary conveyance to her of the south half. Some three or four months thereafter, owing to the intervention of Mr. Mills, Mrs. Coates' solicitor, the plaintiff executed an agreement which was antedated to bear even date with that of the voluntary conveyance, whereby she granted to her mother, during her life, the right jointly with the plaintiff to occupy the said south half, and also covenanted to maintain her. In the spring of 1915, the plaintiff and her mother moved from the old house to the new one of the plaintiff, and they resided there together until the mother's death, which occurred on the 23rd January, 1916" (p. 559).

"I find that the plaintiff . . . excluded the defendant from the presence of his mother for about nine months prior to her death . . . It was during this period of exclusion that the deed in question was procured" (pp. 560, 561).

"Mrs. Coates had been paralysed in her right side for two or three years before her death, and was in her seventy-sixth year and in feeble health when she executed the deed by making her mark" (p. 562).

The plaintiff "gave instructions to the solicitor" (not Mrs. Coates' solicitor, Mr. Mills) "for the preparation of the deed; obtained it from him for execution; took it to her mother, read it to her privately; then sent for the witness to the execution; and afterwards, in the presence of Mrs. Broderick, the witness, read

it again to Mrs. Coates, and this time also explained it to her, in order to ascertain 'whether her mother understood it;' and then, in the presence of the witness and Dr. Sheppard, said to her mother, 'Will you sign?' when the mother said 'Oh, yes, Fanny,' etc., and then signed it" (p. 563).

"Mrs. Coates had for some years been in failing health, mentally and physically, and was wholly dependent on her daughter for the care required by a person of her advanced years and feeble health" (p. 567).

"The mother had left her own house, and was living with the plaintiff; she was in her seventy-sixth year, had for some years been paralysed in her right side, and was incapable of taking care of herself. She gradually became more helpless, and throughout the year 1915 was frequently confined to her bed, occasionally only with difficulty moving around the house but not outside of it. The plaintiff recognised her mother's helpless condition, and had for some years lived with and taken care of her, first in her mother's house and then in her own house. She was her nearest relative, and during the last years of her mother's life had been the only person in attendance upon her. As stated by Mrs. Broderick in her evidence, 'Mrs. Vanzant cooked for her and washed for her and if she was sick got a doctor for her and took good care of her.'

"Q. Was she wholly dependent on Mrs. Vanzant? A. Yes.

"Q. Entirely so? A. Yes.

"Q. And nobody else took any care of her? A. No one else that I know of" (p. 570).

On the question of who employed the solicitor who drew the deed and the question of independent advice, the trial Judge quotes the plaintiff's evidence as follows (p. 562):—

"Q. You employed him? A. Yes.

"Q. And you are to pay him? A. Yes.

"Q. And he was your solicitor? A. Yes.

"Q. Now had your mother any independent lawyer to advise her before she made that deed? A. No, not to my knowledge.

"Q. Or any independent person? A. No.

"Q. Was it wholly a matter resting on the relations between you and your mother? A. Yes."

The plaintiff gave evidence to shew that the deed was the

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

voluntary act of her mother—Mrs. Broderick and Dr. Sheppard gave evidence on her behalf detailing the conditions under which the deed was executed. The learned trial Judge has, not only not accepted the plaintiff's evidence as being truthful, or the evidence of the witnesses Sheppard and Broderick as being sufficient to convince him that the deceased did fully understand and appreciate the effect of the transaction and that she acted voluntarily and deliberately freed from the influence of the plaintiff, but finds: "The plaintiff pretends that she was reluctant to accept a gift of the north half, but that her mother really forced it upon her. I do not accept this account of the transaction; but, on the contrary, am of the opinion that it was a result of the plaintiff's undue influence over her mother" (p. 564).

Counsel for the plaintiff argued that undue influence is not a logical conclusion from the refusal of the trial Judge to accept the plaintiff's statement, and urges that there is no evidence to support a finding of undue influence; and he further argued that Equity does not attach to a gift from parent to child a presumption of undue influence such as would attach to a gift from client to solicitor or from ward to guardian; and, also, that the circumstances surrounding the making of the deed of gift did not create or raise a presumption against its validity or cast upon the plaintiff the burden of proving its righteousness.

The judgment appealed from is, in part, based on the rule of Equity that if a gift made to one who holds a position of influence be attacked by him who is the subject of that influence the Courts of Equity cast upon the former the burden of proving that the transaction was fairly conducted as between strangers; that the weaker was not unduly impressed by the natural influence of the stronger: *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462.

In argument Mr. Wilkie urged that the rule did not apply to a gift from parent to child but was confined to well-known fiduciary relationships such as solicitor and client, guardian and ward, principal and agent, and the like.

It is true that proof of the bare fact that the donee is a child of the donor will not (*Beanland v. Bradley* (1854), 2 Sm. & G. 339, *Armstrong v. Armstrong*, 14 Gr. 528), while proof that the donee at the time of the transaction was the solicitor of the donor will (*Wright v. Carter*, [1903] 1 Ch. 27), cast upon the donee

the burden of proof stated by the rule. But the rule is not, I think, confined to well-known legal or family relationships, but extends to circumstances, as well as to persons, and to any transaction in which it is shewn that the person benefited has influence or is in a position to exercise influence over the other party: *Lyon v. Home* (1868), L.R. 6 Eq. 655. In the case at bar it is not the relationship of mother and daughter that casts the onus stated by the rule on the plaintiff, but the circumstances of age, infirmity, and dependency of the donor, and the position of influence occupied by the donee, and her acts in procuring the drawing and execution of the deed, and the consequent complete change of a well-understood and defined purpose in reference to the disposition of the donor's property. It is in these circumstances, and in that it has not been found that there was no undue influence, that I think the case at bar is distinguishable from such cases as *In re Coomber*, [1911] 1 Ch. 174, and in appeal at p. 723; *Empey v. Fick* (1907), 13 O.L.R. 178, 15 O.L.R. 19; *Taylor v. Yeandle* (1912), 27 O.L.R. 531, 8 D.L.R. 733, and *Armstrong v. Armstrong* (*supra*). The underlying equitable rule seems to be, that if the party is in a situation in which he is not a free agent, and is not equal to protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so, because of their position. As I see it, the question here is not, does the relationship of mother and daughter raise a presumption of undue influence? but, do the circumstances adduced in evidence shew that the plaintiff occupied a position of influence and that the deceased was not a free agent, equal to protecting herself against the plaintiff's influence or domination, or that the plaintiff benefited or profited by her position?

In discussing the rule and its application, Lord Chancellor Brougham in *Hunter v. Atkins* (1834), 3 Myl. & K. 113, at p. 139, says: "I have referred to the case of agent, attorney, or steward, as the strongest; as the one to which the jealousy of the Court is at all times the most watchfully awake; and as the one in which alone I believe (except in *Griffiths v. Robins* (1818), 3 Mad. 191), you will find the interposition of third parties mentioned, to the effect of holding the want of such interposition a sufficient ground for setting aside the transaction. Where the relationship in which

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

App. Div.
1917

VANZANT
v.

COATES.

Ferguson, J.A.

the parties stand to each other is of a sort less known and definite, the jealousy is diminished."

Griffiths v. Robins (*supra*) was a case of an aged female, stricken with blindness, or nearly so, and reduced by her age and infirmities to a condition of entire dependence upon a niece and the husband of that niece, to whom the gift was made; and there, Sir John Leach, V.-C., held that the persons taking the gift were bound to shew that the gift was the result of the free will of the donor *and effected by the intervention of some indifferent person*. That case was referred to in *Hunter v. Atkins* (*supra*) as establishing that in such a case a voluntary and deliberate act could be shewn only by proof of independent advice. With that proposition Brougham, L.C., at p. 137 of the report of *Hunter v. Atkins*, disagrees, but he does not disagree with the proposition that it was a case to which the rule applied so as to cast upon the donees the burden of proving it to have been a voluntary, deliberate, and righteous transaction.

Cooke v. Lamotte (1851), 15 Beav. 234, is another case where the rule was held to apply to a deed of gift to a nephew. Sir John Romilly, Master of the Rolls, at pp. 239 and 240 of the report of that case, says: "The rule in cases of this description is this; where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one."

This case has been frequently referred to and approved in our own Courts; see the recent case of *Kinsella v. Pask* (1913), 28 O.L.R. 393, 406. In *Archer v. Hudson* (1844), 7 Beav. 551, the rule was applied to a transaction between a niece and uncle; while *Allcard v. Skinner*, 36 Ch.D. 145, was an action by a sister of a religious sisterhood against the mother superior.

In *Billage v. Southee* (1852), 9 Hare 534, Turner, V.-C., at p. 540, says: "No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the Court cannot be too freely applied, either as to the persons between whom, or the circumstance in which it is applied. The jurisdiction is founded on the principle of correcting abuses of

confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and *cestui que* trust—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle.”

See also Halsbury's Laws of England, vol. 15, pp. 108, 110, and 420.

A perusal of these and many other authorities has led me to the opinion hereinbefore expressed that the Courts have not limited the application of the rule to any particular defined relationships or sets of circumstances, nor have they differed materially as to its application to any case where it is shewn that the donee is in a position to exercise influence, natural, legal, or otherwise, but that they have required different strengths and kinds of evidence in one relationship, or set of circumstances, to that required in another relationship, or set of circumstances, to satisfy the Court that the act of gift was voluntary and deliberate, and not the result of influence. For instance, the rule applies to both gifts by deed and gifts by will, but the same strong evidence is not required to support a gift by will that is required to support a gift by deed *inter vivos*. As pointed out in *Parfitt v. Lawless*, L.R. 2 P. & D. at p. 469, in will cases the donee who holds the position of influence, shifts the onus by proving mental capacity and due execution by an apparently free agent, and the person attacking must then prove undue influence, which in a will case must amount to more than the influence of affection and attachment and of persuasion short of coercion. Whereas in cases of gifts *inter vivos* the proof of due execution of the deed, is not in itself sufficient to shift the onus, for in these cases Equity presumes undue influence, while in will cases it does not; the reason for the difference being that undue influence in cases of gifts by deed may be by the exercise of the natural influence attaching to the position occupied, by the influence of personal advice, or by persuasion not amounting to coercion, while in will cases the influence exercised must amount to coercion destroying free will agency, before it is, in the eyes of the Court, undue influence. The Court does not presume coercion.

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

App. Div.
1917

VANZANT
v.

COATES.

Ferguson, J.A.

Even in cases of attacks on gifts *inter vivos*, the strength and species of evidence required to satisfy the onus varies according to the relationship of the parties or the circumstances of the case. For instance, in a solicitor and client transaction, proof of independent advice is now required: *Liles v. Terry*, [1895] 2 Q.B. 679; while in our own Courts it is established in *Trusts and Guarantee Co. v. Hart*, 32 S.C.R. 553, that proof of independent advice is not necessary to support gifts from parent to child or from principal to agent.

As put by the Lord Chancellor in *Hunter v. Atkins*, 3 Myl. & K. at p. 139: "Where the relation in which the parties stand to each other is of a sort less known and definite, the jealousy is diminished."

The evidence shews that the plaintiff enjoyed the complete confidence of her mother, and was in a position to influence, and, if she chose, even to dominate and control, her actions; whether she did or did not in this transaction exercise that influence or control is another question, which, as I view the law, it is not necessary to answer, for I think the rule of evidence to be adopted and followed is that stated by Sir John Romilly in *Cooke v. Lamotte*, 15 Beav. at p. 241: "If the Court should be unable to arrive at a satisfactory conclusion upon the subject, one way or the other, the instrument cannot stand."

If that be the proper rule of evidence, then the appellant cannot succeed unless we are able to say not only that the learned trial Judge was wrong in finding, "I am of the opinion that it" (the deed of gift) "was a result of the plaintiff's undue influence over her mother," but that the plaintiff has proved by satisfactory evidence that the gift was a voluntary and deliberate act by a person mentally competent to know, and who did know, the nature and effect of the deed, and that it was not the result of undue influence.

The trial Judge has refused to accept as trustworthy the plaintiff's explanations as to why her mother made the deed. Even had he not done so, her evidence, as recipient of the gift, should not, I think, be taken into account: *Taylor v. Yeandle* (*supra*), following *Walker v. Smith* (1861), 29 Beav. 394.

Under these circumstances, I have no hesitation in saying that the evidence does not satisfy me that the gift was the spontaneous

act of the donor, acting under circumstances which enabled her to exercise an independent will, and that the gift was the result of the free exercise of the donor's will: *Allcard v. Skinner*, 36 Ch.D. at p. 171.

I do not consider it necessary to the support of the judgment appealed from that there should be direct evidence to establish that the deceased was not mentally competent, or that she did not understand, or know, what she was doing, or that the deed was the result of pressure or coercion, or that I should agree with the finding: "I am of the opinion that it" (the deed of gift) "was the result of the plaintiff's undue influence over her mother."

It is, I think, enough to agree, as I do, with the finding and conclusions of the trial Judge when he says (39 O.L.R. at p. 570): "These relations between the two" (mother and daughter) "were such that the plaintiff was in a position to exercise undue influence over her mother; and that circumstance, without proof that it was exercised, casts upon the plaintiff the onus of proving its non-existence . . . The plaintiff not having proved the absence of undue influence, the gift fails and must be set aside."

Proof of the age, infirmity, and dependency of the deceased, and the position that the plaintiff occupied in reference to her, would, I think, alone have cast upon the plaintiff the burden of proof required by the rule. But there are other circumstances pointed out in the unquestioned findings of the trial Judge which were circumstances that should, as said in *Tyrrell v. Painton*, [1894] P. 151, excite the suspicion of the Court. The deed in question was a revocation of a well-established purpose in reference to disposition of the donor's property, as evidenced by her promise to her son in 1890, repeated later to her grandson, and confirmed by her will of 1911. Such a revocation and change required explanation and clear proof of capacity and freedom of action: see *Dodge v. Meech* (1828), 1 Hagg. Eccl. 612, 617; *Blewitt v. Blewitt* (1833), 4 Hagg. Eccl. 410, 464.

The deed of gift was drawn by the donee's solicitor for, and on the instructions of, the donee, and she secured its execution. This, as stated in *Barry v. Butlin* (1838), 2 Moo. P.C. 480, was sufficient to excite the suspicion of the Court and require that the document should not stand unless the suspicion was removed and the Court satisfied that the document expressed the true will of the deceased.

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

Again, the obtaining by the plaintiff in 1914 of the voluntary deed of the south half of the lot, and the circumstances surrounding the obtaining by Mr. Mills of the subsequent but antedated agreement protecting the old lady, and the fact that Mr. Mills was not called in or consulted in the drawing or making of the deed attacked; concealment in that the deed was not registered when made, or made known to the defendant for nearly seven months after its execution, and for more than three months after the mother's death, although he was in possession of the land; the exclusion of the defendant from his mother's presence, and the obtaining of the deed during the period of exclusion—are all, I think, circumstances of suspicion, calling upon the Court for diligent and zealous inquiry and for satisfactory evidence as to the righteousness of the transaction.

The cases of *Tyrrell v. Painton*, *Dodge v. Meech*, *Blewitt v. Blewitt*, and *Barry v. Butlin* (*supra*) are *will cases*, and the onus cast by these suspicious circumstances is held to be shifted by the proof of due execution by a mentally competent and apparently free will agent; but, as pointed out, in a gift *inter vivos* the onus is not so readily shifted. For instance, in *Donaldson v. Donaldson* (1866), 12 Gr. 431, a voluntary transaction between father and son was set aside, and it was held that proof of execution and capacity by the donee was not enough, but that in addition the defendant donee was bound to establish that the transaction was entered into willingly and deliberately on the part of the plaintiff, and without pressure from or influence by the defendant, as the recipient of the benefit.

Mason v. Seney (1865), 11 Gr. 447, 12 Gr. 143, is another case in which deeds of gift from father and mother to son were set aside, and in which Mowat, V.-C., ably reviews the authorities and states the rule as follows (11 Gr. at p. 455): "It (is) necessary for the defendants to establish by clear evidence that the old people really did make the deeds which the defendants claim under; that their nature and effect were fully and truly explained; that they, the donors, perfectly understood them; that they were made alive, by explanation and advice, to the effect, and consequences to themselves, of executing them; and that the deeds were willing acts on their part, and not obtained by the exercise of any of that influence which (the son's) position put it in his power to employ.

It is almost impossible in such a case as the present to establish these necessary particulars, unless the donors have had the benefit of independent professional or other assistance in the transaction."

See also *McDougall v. Paille* (1913), 24 O.W.R. 912, 4 O.W.N. 1602, 13 D.L.R. 661.

My attention has been drawn to a recent and instructive decision of the Manitoba Court of Appeal, just reported in the current number of the Dominion Law Reports, *Cripps v. Woessner* (1917), 36 D.L.R. 80; in that case the deed of gift was sustained, but a careful perusal of the report shews, I think, that the decision turned on the fact that it was, by the donor's own evidence, shewn affirmatively that he not only executed the documents, but that he knew and understood what he was doing; that they were not the result of the donee's persuasion, acts, advice, or influence, but the result of his own deliberate folly.

The learned trial Judge has found against the appellant, and I cannot say either that his findings of fact are not supported by the evidence, or that in arriving at his conclusions of law he erred in the law or its application to the facts as they appear in evidence.

For these reasons. I would dismiss the appeal with costs.

Judgment accordingly.

[APPELLATE DIVISION.]

RE ORR.

Will—Validity of Bequests—Charitable and Religious Gifts—Trusts—Objects of Bounty—Christian Science Churches—Public Policy—Gift for "Purpose Beneficial to the Community"—Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103, sec. 2 (2)—Application to Personal Estate—"And whatever may seem to Require Assistance"—Uncertain Bequests—Rule against Perpetuities—Residuary Bequest—"Used for God only"—Presumption against Intestacy—Effective Expression of Intention—Invalid Bequests—Funds Falling into Residue—General Charitable Intention—Application of Fund Cy-près—Execution of Trust—Indefiniteness of Objects—Reference to Propound Scheme for Application of Residuary Estate.

The testatrix by her will gave her whole estate and effects, real and personal, to three persons as executors and trustees in trust for the purposes mentioned in her will. She was a member of the religious body known as Christian Scientists, and was much interested in the spread of its doctrines. Her estate was of the value of more than \$200,000, chiefly personalty. The "purposes mentioned" were, as set out in the will, eight in number, in the form of bequests, for named purposes, of specified sums amounting in all

App. Div.
1917

VANZANT
v.
COATES.

Ferguson, J.A.

1917

May 16.
Nov. 12.

1917

RE
ORR.

to \$110,000; and, after these bequests, there was this clause: "The whole of my estate must be used for God only." It was held:—

- (1) and (2) That the first and second bequests, viz., "The Mother Church, Boston, ten thousand dollars to be used in spreading the truth," and "Ten thousand dollars towards encouraging those building C. S. Churches, to be distributed" in a manner described, were not invalid as being contrary to public policy.

Nothing in law or morals forbids the propagation of views which are opposed to what is generally accepted as true.

Thornton v. Howe (1862), 31 Beav. 14, followed.

Rex v. Lewis (1903), 6 O.L.R. 132, distinguished.

- (3) *Per SUTHERLAND, J.*, the Judge of first instance, that the third bequest, "Ten thousand to be placed to the interest of B." (a village) "to be used only for such purposes as will elevate the community spiritually," was a good charitable bequest. There was no appeal as to this.

- (4) That the fourth bequest, "Ten thousand for the benefit of those who are endeavouring to uplift the needy in Chicago, such as Miss Jane Addams, United Charities, and whatever may seem to require assistance," was a charitable bequest and not void for uncertainty.

If this gift was not for the relief of poverty, it was at all events a gift for a "purpose beneficial to the community" (Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103, sec. 2 (2) (d)), and therefore a charitable bequest.

Sub-section (2) of sec. 2 expressly declares that the purposes which it enumerates shall be deemed to be charitable uses within the meaning of the Act; and the Courts of Ontario are warranted in looking to it for the purpose of determining what in law is a charitable gift in the case of personalty, although the provision does not apply to personalty.

According to English law a gift is not necessarily charitable because it is for the advancement of an object of general public utility.

The change made in the law when the Act 9 Edw. VII. ch. 58 (now R.S.O. 1914, ch. 103) was passed was to prevent the English doctrine from being applied in Ontario.

Semble, even according to the English rule, this bequest would be a charitable one: *In re Allen*, [1905] 2 Ch. 400, 21 Times L.R. 662.

Semble, also, if the gift were not charitable, it might be upheld as one for the benefit of the persons or bodies referred to by the testatrix, as were the bequests in *Cocks v. Manners* (1871), L.R. 12 Eq. 574, and similar cases.

Semble, also, that the words "and whatever may seem to require assistance" meant that only those persons or bodies that seemed to the trustees to require assistance should be helped.

- (5) and (6) *Per SUTHERLAND, J.*, that the fifth and sixth bequests, "Five thousand to be used for any necessary or uplifting purpose among father's kin," and the same sum for the same purpose "among mother's kin," were valid bequests to the next or nearest of kin. There was no appeal as to these.

- (7) That the seventh bequest: "Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor-houses, Gaols, Penitentiaries or any place that is maintained for the uplifting of humanity:" was a charitable bequest, and not void for uncertainty nor because contingent upon the happening of events which might not happen within the time prescribed by the rule against perpetuities (FERGUSON, J.A., dissenting).

The meaning was, that help should be given to institutions to enable them to demonstrate "that God's people are willing to help others to see the light," etc., the effect of which the testatrix believed would do away with hospitals and the other institutions she mentioned.

The intention in favour of charity was found in the provision that the whole of the estate of the testatrix "must be used for God only," and was absolute; the gift and the constitution of the trust were immediate; and the only

1917

RE
ORR.

thing that was postponed or made dependent upon future and uncertain events, if anything, was the particular form or mode of charity to which the \$50,000 was to be applied.

Chamberlayne v. Brockett (1872), L.R. 8 Ch. 206, followed.

This gift might also be supported as one for a "purpose beneficial to the community," and so a charitable bequest coming under the 4th head of sec. 2 (2) of the Act.

(8) That the 8th bequest: "Ten thousand as a fund to be used in lending to deserving people . . . to buy small homes or farms—this money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilised . . . in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy;" was void for uncertainty.

(9) That the provision, "The whole of my estate must be used for God only," was a valid declaration of trust as to the estate of the testatrix not effectually disposed of by her will; the object of the trust was sufficiently declared—it was a good charitable trust for religious purposes.

Phelps v. Lord (1894), 25 O.R. 259, and *In re Darling*, [1896] 1 Ch. 50, approved and followed.

There is a presumption that a testator does not intend to die intestate as to any part of his property; and there is a well-settled rule that any language which a testator uses which reasonably may be treated as an expression of his intention as to the disposition to be made of his property, is effective to dispose of it in the manner indicated.

Having regard to the earlier words of the will, the words quoted could not be read as meaning merely that the preceding bequests should be "used for God only."

(10) That the money bequeathed by any bequest declared invalid, fell into the residue, and was impressed with the trust for religious purposes; and the Court would execute the trust and administer the fund by means of a scheme—the indefiniteness of the objects of the gift being immaterial and not affecting its validity.

The testatrix evidencing a general charitable intention which she wished to carry out in the particular way she indicated, and not an intention to promote specific and well-defined purposes and them only, the invalid gift did not fail—the fund would be applied *cy-près*.

In re University of London Medical Sciences Institute Fund, [1909] 2 Ch. 1, followed.

(11) That there should be a reference to the Master to propound a scheme for the application of the residuary estate.

Judgment of SUTHERLAND, J., varied.

MOTION by the executors of the will of Mary Helen Orr, deceased, upon originating notice, for an order determining certain questions as to the construction of the will and the validity of the bequests contained in it.

February 8 and 9. The motion was heard by SUTHERLAND, J., in the Weekly Court, Toronto.

T. Stewart, for the executors.

E. D. Armour, K.C., for the Official Guardian.

R. J. McLaughlin, K.C., and *T. H. Stinson*, for Mary Cameron.

A. M. Fulton, for the Corporation of the Town of Bobcaygeon and three cousins of the testatrix.

1917

RE
ORR.

I. F. Hellmuth, K.C., and *E. C. Cattnach*, for various charities and religious bodies.

J. A. Paterson, K.C., for father's kin.

Daniel O'Connell, for mother's kin.

May 16. SUTHERLAND, J.:—By this motion is sought a construction of the will of Mary Helen Orr, of the village of Bobcaygeon, in the county of Victoria, in this Province, spinster, dated the 29th day of August, 1912, and who died at the city of Toronto, in this Province, on the 29th day of June, 1916. The executors named in the will are: George S. Haddock, of the city of Boston, Massachusetts, U.S.A., and Alfred Farlow, of the city of Los Angeles, California, U.S.A., both described as Christian Science practitioners; and William G. Moore, of Bobcaygeon, aforesaid, manufacturer.

Letters probate were, on the 11th September, 1916, duly issued to them by the Surrogate Court of the said County of Victoria.

The estate consists of real and personal property amounting to \$200,000 or thereabouts, of which approximately \$125,000 is in this Province, and the remaining \$75,000 in the city of Chicago, in the State of Illinois, U.S.A. The bulk of the estate is personalty, there being only about \$1,100 of real property, nearly half of which is in Illinois and the remainder in Ontario.

The will is not long, and, being somewhat unusual, I set it out in substantial part as follows:—

"I . . . do hereby give, grant, assign, dispose, convey and make over to and in favour of Mr. George Silas Haddock . . . Mr. Alfred Farlow . . . and Mr. William G. Moore . . . and the survivor of them, as trustees and in trust for the purposes aftermentioned, the whole estate and effects, heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease, together with the whole writs and vouchers thereof; and I nominate and appoint the said . . . Haddock . . . Farlow . . . Moore, and the survivor of them, as they may appoint, to be my sole executors and trustees of this my will, but declaring that these presents are granted in trust always for the purpose aftermentioned, viz.:—

“(First) I direct my executors and trustees to first pay my just debts, personal and testamentary expenses.

“(Second) I give, devise and bequeath unto:—The Mother Church, Boston, ten thousand dollars to be used in spreading the truth. Ten thousand dollars towards encouraging those building C.S. Churches, to be distributed in smaller or larger sums as may be wise, from \$100 to \$300 to each church. Ten thousand to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually. Ten thousand for the benefit of those who are endeavouring to uplift the needy in Chicago, such as Miss Jane Addams, United Charities, and whatever may seem to require assistance. Five thousand to be used for any necessary or uplifting purpose among father’s kin. Five thousand to be used for any necessary or uplifting purpose among mother’s kin. Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God’s people are willing to help others to see the Light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor-houses, Gaols, and Penitentiaries or any place that is maintained for the uplifting of humanity. Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilised as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the Revelation as given in Science & Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

“And I reserve my life-rent, and full power to alter, innovate, or revoke these presents in whole or in part. And I dispense with the delivery hereof. And I consent to the registration hereof for preservation.”

The material filed discloses that the testatrix was a Christian Scientist, and the will itself shews, in the appointment of two of the executors, and in various paragraphs thereof, an intention to benefit that sect, if I may so term it.

Sutherland, J.

1917

RE
ORR.

Sutherland, J.

1917

RE
ORR.

It also shews that the testatrix was predeceased by her father, mother, brothers and sisters, nephews and nieces. There is an aunt living, one Mary Cameron, said to be the nearest next of kin, and there are descendants of brothers and sisters of the father and mother of the testatrix, a considerable number of whom are represented by counsel on the motion.

The questions as to which the opinion and advice of the Court is sought by the executors are as follows, and will be dealt with by reference to their numbers as set out in the notice of motion:—

“(4) What is meant by ‘The Mother Church, Boston,’ and to what person or corporation shall the sum of \$10,000 firstly above-mentioned be paid?”

The language used by Blackburn, J., in *Allgood v. Blake* (1873), L.R. 8 Ex. 160, at p. 162, namely—“The general rule is that, in construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words”—is often quoted in connection with the interpretation of wills. As also the more terse words of James, L.J., in *Boyes v. Cook* (1880), 14 Ch. D. 53, at p. 56: “You may place yourself, so to speak, in his,” the testator’s, “arm-chair.”

Evidence was, I think, properly admissible and was received to shew what the relationship of the testatrix was to the First Scientist Church of Boston, and that that church was known to her, and to Christian Scientists generally, as “The Mother Church,” not as evidence of the intention of the testatrix, as to which the words used are plain and must be given effect to, but for the purpose of ascertaining the particular church intended to be benefited under the appellation of “Mother Church.”

By an affidavit of John V. Dittmore, in which he states that he is clerk of the First Church of Christ Scientist in Boston, Mass., it appears that that church is commonly designated as the “Mother Church.” As an exhibit to the said affidavit there is “A Manual of the Mother Church, the First

Church of Christ Scientist in Boston, Mass., by Mary Baker Eddy," which purports to set out the tenets of the "Mother Church" and has many references to the said "Mother Church." Article 23, appearing therein, provides as follows:—

Sutherland, J.

1917

RE
ORR.

"Local Self-government. Section 1. The Mother Church of Christ, Scientist, shall assume no general official control of other churches, and it shall be controlled by none other.

"Each Church of Christ, Scientist, shall have its own form of government. No conference of churches shall be held, unless it be when our churches, located in the same State, convene to confer on a statute of said State, or to confer harmoniously on individual unity and action of the churches in said State.

"Titles. Section 2. 'The First Church of Christ, Scientist,' is the legal title of the Mother Church."

The said affidavit goes on to state as follows: "Miss Mary Helen Orr was duly enrolled as a member of the Mother Church on April 6, 1895. Christian Science was discovered and founded by Mary Baker G. Eddy and the truths in the Bible were interpreted by her in the Christian Science text-book 'Science and Health with Key to the Scriptures.' The Bible together with 'Science and Health with Key to the Scriptures' and other works by Mrs. Eddy are the only text-books in Christian Science. To become a member of the Mother Church, the applicant must be a believer in Christian Science according to the platform and teaching contained in the Christian Science text-book (Article IV. No. 1)."

This article is as follows: "Belief in Christian Science. Section 1. To become a member of the Mother Church, The First Church of Christ, Scientist, in Boston, Mass., the applicant must be a believer in the doctrines of Christian Science, according to the platform and teaching contained in the Christian Science text-book, Science and Health with Key to the Scriptures, by Rev. Mary Baker Eddy. The Bible, together with Science and Health and other works by Mrs. Eddy, shall be his only text-books for self-instruction in Christian Science, and for teaching and practising metaphysical healing."

The affidavit further goes on to state: "The First Church of Christ, Scientist, in Boston, Massachusetts, acting by and through its Board of Directors, is under the laws of the Common-

Sutherland, J.

1917

RE
ORR.

wealth of Massachusetts deemed a body corporate for the purpose of taking and holding in succession all gifts, grants, bequests and devises, of real or personal estate made to the directors and their successors or to the Church."

Upon the argument counsel made a critical and learned analysis of the doctrines of Christian Science as set forth and explained in "Science and Health with Key to the Scriptures, by Mary Baker Eddy," the founder of the sect, and who is said to have claimed to have had some divine revelation enabling her correctly to interpret the scriptures, and as embodied in the said "Manual of the Mother Church, the First Church of Christ Scientist, in Boston, Mass."

It was argued that the opinion and tenets of the sect were opposed to experience and common sense, and, when put fully into practice, led to contraventions of the law for which those concerned had been punished in the criminal Courts.

It was argued that believers in Christian Science hold the opinion that there is no such thing as pain or suffering, that such things are merely mental concepts; that humanity is "incapable of sin, weakness, and death;" that medical science as ordinarily practised is futile; and that cures of what are inaccurately and unscientifically called "diseases of the human body" may be effected by mental and moral means.

I quote from "Science and Health," p. 149: "The author has cured what is termed organic disease as readily as she has cured purely functional disease, and with no power but the divine mind."

And from p. 150: "The hosts of Æsculapius are flooding the world with diseases, because they are ignorant that the human mind and body are myths. To be sure, they sometimes treat the sick as if there was but one factor in the case; but this one factor they represent to be body, not mind. Infinite Mind could not possibly create a remedy outside of itself, but erring, finite, human mind has an absolute need of something beyond itself for its redemption and healing. Great respect is due the motives and philanthropy of the higher class of physicians. We know that if they understood the Science of Mind-healing, and were in possession of the enlarged power it confers to benefit the race physically and spiritually, they would rejoice with us. Even this one reform in medicine would ultimately deliver mankind

from the awful and oppressive bondage now enforced by false theories, from which multitudes would gladly escape."

And from p. 152: "The author's medical researches and experiments had prepared her thought for the metaphysics of Christian Science. Every material dependence had failed her in her search for truth; and she can now understand why, and can see the means by which, mortals are divinely driven to a spiritual source for health and happiness. Her experiments in homœopathy had made her sceptical as to material curative methods. Jahr, from *aconitum* to *zincum oxydatum*, enumerates the general symptoms, the characteristic signs, which demand different remedies; but the drug is frequently attenuated to such a degree that not a vestige of it remains. Thus we learn that it is not the drug which expels the disease or changes one of the symptoms of disease.

"The author has attenuated *natrum muriaticum* (common table-salt) until there was not a single saline property left. The salt had "lost his savour;" and yet, with one drop of that attenuation in a goblet of water, and a teaspoonful of the water administered at intervals of three hours, she has cured a patient sinking in the last stage of typhoid fever. The highest attenuation of homœopathy and the most potent rises above matter into mind. This discovery leads to more light. From it may be learned that either human faith or the Divine Mind is the healer, and that there is no efficacy in a drug. You say a boil is painful; but that is impossible, for matter without mind is not painful. The boil simply manifests, through inflammation and swelling, a belief in pain, and this belief is called a boil. Now administer mentally to your patient a high attenuation of truth, and it will soon cure the boil. The fact that pain cannot exist where there is no mortal mind to feel it is a proof that this so-called mind makes its own pain—that is, its own belief in pain.

"We weep because others weep, we yawn because they yawn, and we have smallpox because others have it: but mortal mind, not matter, contains and carries the infection."

I was asked to conclude and determine that bequests contained in the will made either to an individual church or for the purpose of propagating or perpetuating the doctrines of the Christian Science sect in any manner, were against public policy and void.

Sutherland, J.

1917

RE
ORR.

Sutherland, J.

1917

RE
ORR.

It would not, however, be possible for me, in considering the construction of the will in question, to express any such sweeping opinion about or condemnation of a sect whose founder, rightly or wrongly, after an orthodox or heterodox fashion, in agreement with or at variance with ordinary and accepted medical and scientific opinion, established it professedly on the Bible and her construction and interpretation thereof. Before one could do so, it would, I think, be necessary to conclude that there was something of a definitely irreligious or immoral tendency in her teaching.

In Halsbury's Laws of England, vol. 4, para. 182, it is said: "The promulgation of particular doctrines or principles may be charitable, as, for instance, Conservative principles combined with mental and moral improvement, Socialism, anti-vivisection principles, or the distributing of the writings of Joanna Southcote, a foolish and ignorant woman, whose works, however, were written obviously with a view to extend the influence of Christianity. In deciding whether a particular gift is charitable as being beneficial to the community, the main point to consider is the purpose."

In the case of *Thornton v. Howe* (1862), 31 Beav. 14, in speaking of a bequest in the will of a testatrix named Ann Essam, wherein she directed that the "produce" of her real and personal estate should be applied "for and towards the printing, publishing and propagation of the sacred writings of the late Joanna Southcote," the Master of the Rolls, at p. 20, says: "Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void; but the character of the bequest, so far as regards the Statute of Mortmain, would not be altered by this circumstance. The general immoral tendency of the bequest would make it void, whether it was to be paid out of pure personalty or out of real estate. But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the

class of legacies which are included in the general terms charitable bequests."

And again at p. 21: "I cannot say that the bequest of a testator to publish and propagate works in support of the Christian religion is a charitable bequest, and, at the same time, say, that if another testator should select for this purpose some three or four authors, whose works will, in his opinion, produce that effect, such a bequest thereupon ceases to be charitable."

It is said that the definition of "Charities," as found in our Mortmain and Charitable Uses Act, is derived from the judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531, at p. 583: "How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

According to our Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103, sec. 2, sub-sec. (2), the following are to be deemed to be charitable uses within the meaning of this Act: "(a) The relief of poverty; (b) education; (c) the advancement of religion; and (d) any purpose beneficial to the community, not falling under the foregoing heads."

This bequest to the Mother Church at Boston I take to be a bequest for the advancement of religion: and question (4) should, I think, be answered as follows: By "The Mother Church, Boston," is meant "The First Church of Christ, Scientist, Boston," and it is entitled to the said bequest of \$10,000.

Question (5): "Is the Mother Church, Boston, or any other Church, corporation or persons, entitled to receive the sum of \$10,000, or any part thereof, 'towards encouraging those building C.S. Churches, to be distributed in smaller or larger sums as may be wise, from \$100 to \$300 to each church,' above-mentioned, and, if so, to what person or persons or corporation shall the said money be paid?"

Sutherland, J.

1917

RE
ORR.

Sutherland, J.

1917

RE
ORR.

This is another of the clauses of the will in question in which is manifested the intention of the testatrix to aid and assist persons, institutions, and churches associated with the Christian Science sect. The purpose of this bequest is, I think, charitable in the legal sense, and the language definite enough to make it a valid bequest. It is left to the discretion of the executors to select and distribute the fund to such recipients of the kind indicated, within the sums mentioned, as they may determine.

It was suggested that this bequest was void as contravening the rule as to perpetuities. If the purpose of the gift, however, is charitable, the rule against perpetuities seems to be altogether excluded: Marsden's Law of Perpetuities (1883), pp. 295, 298.

Question (6): "What is meant by the following words above set out: 'Ten thousand to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually?' Is the Village of Bobcaygeon or any other corporation or persons entitled to receive the sum of \$10,000 out of the estate to be used for the benefit of the said village, and, if so, in what way may the said moneys be used?"

"Gifts . . . for inhabitants of particular localities, as of a borough, city, town, or village . . . are charitable:" Halsbury's Laws of England, vol. 4, para. 179, pp. 114, 115.

I am of the opinion that this legacy is a charitable bequest.

It appears to me, however, that the use of the word "spiritually," as affecting or qualifying the word "elevate," or suggesting the kind of elevation of the community intended by the testatrix, indicates an intention that the legacy should be applied for religious purposes only. This view is perhaps strengthened if one can or should, if there is doubt, read the clause in association with the later clause in the will, "The whole of my estate must be used for God only." The word "spiritually" has normally a reference to sacred or religious as contrasted with lay or temporal things. As there is, however, no reference in this clause of the will to the Christian Science or any particular religious sect, it would almost seem that the legacy might properly be divided in equal proportions among the religious sects or churches in the town of Bobcaygeon.

It might, however, be said that such an interpretation or disposition might exclude such well-known religious agencies as the Young Men's Christian Association.

It was contended that each clause of the will should be read in the light of an alleged general intention on the part of the testatrix to benefit the Christian Science sect, and that the expression "for God only" must be construed to mean for the worship of God according to Christian Science tenets, and the expression "elevate the community spiritually" should be considered and interpreted in the same way.

The expression "for God only" is a wide and vague term, and difficult, if not impossible, to define and apply. This expression does not in express terms refer to the Christian Science sect, and some of the bequests contained in the will plainly have no reference to that sect.

If one were to attempt to suggest or enumerate a list of subjects which it would cover or to which it would apply, it would launch him out upon a controversial and well-nigh limitless sea of speculation.

The answer to this question will therefore be, The legacy is a valid one; and there will be a reference to the Master to ascertain the religious sects, churches, or associations in Bobcaygeon entitled to share therein.

Question (7): "Are any person or persons, corporation or corporations, entitled to receive the sum of \$10,000, 'for the benefit of those who are endeavouring to uplift the needy in Chicago, such as Miss Jane Addams, United Charities, and whatever may seem to require assistance;' and, if so, in what proportions and to whom or to what corporations shall the said money be paid?"

By depositions of Miss Jane Addams, taken at the city of Chicago, it appears that she is a woman who is devoting her life to the work of uplifting the needy, and has frequently written and lectured on Social and Political Reform, and is the author of books dealing with subjects of that kind; that gifts, devises, and bequests have often been made to her with the intention that they should be used in carrying on the work of what is known as "Hull House," and which, as she says, was duly incorporated, and "has power to receive real estate and personal property by devises or bequests." She states that the object of Hull House, in the city of Chicago, as stated in its charter, is "to provide a centre for a higher civic and social life, to institute and maintain

Sutherland, J.

1917

RE
ORR.

Sutherland, J.

1917

RE
ORR.

educational and philanthropic enterprises, and to investigate and improve the conditions in the industrial districts of Chicago."

In her said depositions she sets forth many educational and social works in which she and Hull House are engaged for the uplifting of the needy, and states among other things that "Hull House has long co-operated with the United Charities of Chicago, the Cook County Juvenile Court, the Immigrants' Protective League, the Juvenile Protective Association of Chicago, and other charitable organisations, in attempts to remedy the needs of its neighbourhood and of the residents thereof."

Her depositions further disclose that of the activities of herself and Hull House the greater number are performed free of charge; that the testatrix, Mary Helen Orr, while visiting in Illinois, was a frequent caller at Hull House, and made cash donations thereto of small amounts, commencing in the year 1910 and ending in 1915, and aggregating \$415.

By depositions of Julius Rosenwald, also taken at Chicago, for use on the motion, it appears that he is the first vice-president of the United Charities of Chicago, incorporated under a special Act of the Legislature of the State of Illinois, in the year 1909, superseding a previous organisation under a different name, and that the said corporation "has power to receive, by devise or bequest, real and personal property;" that the objects of the corporation are "to provide a permanent, efficient, and practical mode of administering and distributing the private charities of the City of Chicago; to examine and establish the necessary means for obtaining full and reliable information of the condition and wants of the poor of said city, and putting into practical and efficient operation the best system of relieving and preventing want and pauperism therein." In a word, an organisation whose work is to endeavour to uplift the needy. He further states in his depositions that the said corporation is supported entirely by voluntary contributions of citizens who believe in its work, and the work carried on by it is a very extensive one.

If the wording of this bequest, properly construed, is that the sum in question is for the benefit of Miss Addams, the United Charities, and other persons and organisations endeavouring to uplift the needy, it cannot, I think, be considered a charitable bequest, or valid. It would perhaps be a benevolent bequest, but

not a "charitable" one: *Attorney-General for New Zealand v. Brown*, [1917] A.C. 393.

Sutherland, J.

1917

RE
Orr.

But, if the last clause in this bequest, namely, "whatever may seem to require assistance," can be read to suggest and imply that the fund, though to be paid or entrusted to Miss Addams, the United Charities, and the like, is in reality to be employed by them to uplift the needy and render aid to such as require assistance, the gift may well be upheld as a charitable one.

On the whole I am disposed to take that view and so construe it.

As it appears that Miss Addams (personally and in connection with Hull House) and the United Charities are endeavouring in their various spheres of work to uplift the needy in Chicago, and that they co-operate with each other and with other organisations engaged in a like work, so as largely to cover, in the city of Chicago, general work of that kind, the sum may well be divided between and allotted to Miss Addams and the United Charities so as to carry out as far as possible the intention of the testatrix.

Questions (8) and (9) can be considered together and are as follows:—

"(8) Is the kin of the deceased, on her father's side, or any of them, entitled to receive the sum of \$5,000 mentioned in the said will; and, if so, to whom and for what purposes and in what manner shall the said money be paid?

"(9) Is the kin of the deceased, on her mother's side, or any of them, entitled to receive the sum of \$5,000 mentioned in the said will; and, if so, to whom and for what purposes and in what manner shall the said money be paid?"

These two legacies are clearly and definitely expressed, the only question being as to the individuals comprising the classes who are entitled to share.

"Kin" must, I think, be construed to mean next of kin, or nearest of kin, and a reference will be necessary to ascertain who they are. Upon the argument no one contended that these were not valid bequests.

Question (10): "What is meant by 'Fifty thousand will be held as a fund towards helping to supply such institutions,' etc?"

Sutherland, J.

1917

RE
ORR.

What shall the executors do with the sum of \$50,000 above referred to, and who are entitled to receive the same and in what proportions?"

After repeated perusals and consideration of this clause of the will, I have come to the conclusion that the language in which the legacy is couched is so vague, visionary, chimerical, and impracticable, and the objects intended to be benefited and the time when the benefit is to accrue are so uncertain, that no reasonable or intelligible construction or effect can be given to the clause; and the legacy must, therefore, be held to be void.

Question (11): "What is the meaning of the following words, above-mentioned, 'Ten thousand as a fund to be used in lending to deserving people,' etc? What shall the executors do with the moneys so referred to?"

The term "deserving people" does not necessarily imply poor people, nor does a bequest to them necessarily indicate a purpose beneficial to the community under clause (d) of sec. 2, sub-sec. (2), of the Mortmain and Charitable Uses Act.

In *Kendall v. Granger* (1842), 5 Beav. 300, Lord Langdale, the Master of the Rolls, said, at p. 303: "In this case the direction is to apply this fund 'for the relief of domestic distress, assisting indigent but deserving individuals.' I confess, in my view, that if the sentence had ended here, I should have said that this was a good charitable purpose; for its object is to relieve distress by assisting indigent but deserving individuals, and that would be a valid, charitable purpose because of the word 'indigent;' but the testator goes on to say 'or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever.' Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own, that in my opinion, according to the decisions which have taken place in this Court, they are not. The words 'general utility' are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and con-

sequently to divert the trust-fund from those purposes which this Court is in the habit of considering charitable."

If in this case there had been joined with the word "deserving" some other word suggesting that the proposed recipients of the benefit were poor or needy, then the gift might be good as a charitable gift; but, otherwise, I am of opinion that it is not. Such gift as may have been intended does not appear to be of very substantial benefit, as ordinarily people can obtain loans on good security at 6 per cent. without much difficulty. The fund is apparently to be carried on and administered for an unlimited and perpetual period, and the profits accruing from its investment are to be utilised in helpful work of such a vague and uncertain kind, and for the benefit of recipients so uncertain and difficult of selection or ascertainment, that I am unable to see how the trust can be entered upon or carried out.

For these reasons, I am of opinion that this legacy is void.

Question (12): "Who is or are entitled beneficially to receive the balance or remainder of the estate of the said testatrix after payment of her debts, funeral and testamentary expenses, and the several and respective sums of money above mentioned?"

There is no residuary clause in the will. There would apparently be a residue of the estate undisposed of by the will, even if all the legacies referred to were held to be valid. It will be much increased by the opinion I have expressed as to the invalidity of certain of the bequests resulting in the sums therein mentioned falling into and becoming part of the residue. As I have already intimated, I am of opinion that the expression "The whole of my estate must be used for God only" is too broad, indefinite, and controversial to be intelligible or capable of being carried out.

The executors in attempting to administer such a trust would be met with a multitude of objects over a widespread area and indefinite period of time.

The personal estate is apparently ample to provide for the payment of all specific bequests contained in the will. It is probable that the executors, in the administration of the estate, and when dealing with the legacies which go to the Mother Church at Boston, or to persons outside of the Province, will resort to that part of the estate situate within the foreign jurisdiction.

Sutherland, J.

1917

RE
ORR.

Sutherland, J.

1917

RE
ORR.

It was argued that there was no proper proof by expert opinion that the Mother Church was legally capable of taking the bequest to which I have declared it to be entitled. In a bigamy case of *Rex v. Naguib*, [1916] W.N. 427,* Viscount Reading, at p. 428, in delivering the judgment of the Court, held, "following *Regina v. Povey* (1852), Dears C.C. 32, *Regina v. Savage* (1876), 13 Cox C.C. 178, *Rex v. Lindsay* (1902), 66 J.P. 505, that the foreign law could only be proved by the evidence of some one conversant therewith, and that, as no such evidence was tendered, the appellant failed to prove a valid marriage in Egypt." Strictly speaking this is so here. I think, however, I should grant leave to the Mother Church to supplement the material filed, by such expert testimony as may be necessary. The like leave is also granted to the United Charities.

Reference to *Kendall v. Granger*, *supra*; *Thornton v. Howe*, *supra*; *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265, at p. 267; *In re Darling*, [1896] 1 Ch. 50; *In re Macduff*, [1896] 2 Ch. 451; *Hunter v. Attorney-General*, [1899] A.C. 309, at pp. 317, 321; *Re Wilson* (1899), 30 O.R. 553; *Re Geck* (1893), 69 L.T.R. 819; *In re Moore*, [1901] 1 Ch. 936; *Re Huyck* (1905), 10 O.L.R. 480; *In re Freeman*, [1908] 1 Ch. 720; *In re Davidson*, [1909] 1 Ch. 567; *In re Wilson*, [1913] 1 Ch. 314; *In re Bowman, Secular Society Limited v. Bowman*, [1915] 2 Ch. 447, at p. 461; *Grimond (or Macintyre) v. Grimond*, [1905] A.C. 124; Wigram on Extrinsic Evidence, 5th ed. (1914), pp. 56-59; Hawkins on Wills, 2nd ed. (1912), pp. 14, 15; Theobald on Wills (1908), Can. ed., pp. 351-367; Halsbury's Laws of England, vol. 4, pp. 117, 153.

The costs of all parties will be out of the residuary estate—those of the executors as between solicitor and client.

The Church of Christ, Scientist, and the persons claiming under those provisions of the will which were declared by the judgment of SUTHERLAND, J., to be invalid, appealed against that part of the judgment which so declared; and Mary Cameron, claiming as next of kin of the testatrix, appealed from the judgment in so far as it declared valid certain of the bequests in the will.

*This case is now reported, [1917] 1 K.B. 359.

September 19, 20, and 21. The appeals were heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., LENNOX, J., and FERGUSON, J.A.

App. Div.
1917
—
RE
OBB.

I. F. Hellmuth, K.C., and *E. C. Cattanaach*, for the appellants the Church of Christ, Scientist, and other charities and religious bodies, argued that the scope of the whole will was charitable, and that the final provision that the whole of the estate should be used "for God only," constituted a good residuary devise, and had a controlling effect upon the other provisions of the will. [MAGEE, J.A., suggested that the Attorney-General for Ontario should be represented.] The whole estate is devised for charitable purposes; and, if necessary, the Court will find objects under the *cy-près* doctrine, to which the \$50,000 devised by the 7th bequest in the will should be applied. Counsel referred to *Phelps v. Lord* (1894), 25 O.R. 259, where MacMahon, J., cited *Powerscourt v. Powerscourt* (1824), 1 Molloy 616; *Whicker v. Hume* (1851) 14 Beav. 509; *Felan v. Russell* (1842), 4 Ir. Eq. R. 701; and *In re Lea* (1887), 34 Ch. D. 528. The latest case on the subject is *In re Darling*, [1896] 1 Ch. 50, where Stirling, J., held that a gift by will "to the poor and the service of God" is a good charitable gift. Counsel also cited *Mayor etc. of Beverley v. Attorney-General* (1857), 6 H.L.C. 310, *per* Lord Cranworth, L.C., at p. 318, where he discusses the effect of a testator giving his whole estate to charity, while only a part is specifically appropriated; also *Wallis v. Solicitor-General for New Zealand*, [1903] A.C. 173, *per* Lord Macnaghten, at p. 183; *Bowman v. Secular Society Limited*, [1917] A.C. 406. On the *cy-près* doctrine, he referred to Halsbury's Laws of England, vol. 4, p. 190, paras. 333 *et seq.*, especially paras. 338, 343, 344. Reference was also made to *Re Kenny* (1907), 97 L.T.R. 130; *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531, 583; Jarman on Wills, 6th ed., pp. 233, 234, summing up the legal effect of the cases on *cy-près*. The learned Judge below erred in ignoring the leading note of this will, as being a charitable will, which should not be defeated in its main object by any alleged vagueness or obscurity.

E. D. Armour, K.C., for the Official Guardian, referred to *Rex v. Lewis* (1903), 6 O.L.R. 132, as to the legal duty under the criminal law of supplying such necessities as proper medical

App. Div.
1917
—
RE
ORR.

care and treatment. He referred to the *Bowman* case, *supra*, at pp. 446, 457, 458, 459, 466, 467, and argued that that case did not in any way weaken the contention of those who asserted that the teachings of the followers of Mrs. Eddy struck at the foundation of the most vital principles on which human society is based. The 4th bequest, "for the benefit of those who are endeavouring to uplift the needy in Chicago," is too uncertain and indefinite to allow effect to be given it by the Court—there is no trust that obliges the recipient of the fund to devote it to charity. Reference was made to *Re McCauley* (1897), 28 O.R. 610; *Doe dem. Vancott v. Read* (1847), 3 U.C.R. 244; Theobald on Wills, 7th (Canadian) ed., p. 369. It is not competent for the Court to formulate a scheme for the administration of a foreign charity: *New v. Bonaker* (1867), L.R. 4 Eq. 655; *Attorney-General v. Sturge* (1854), 19 Beav. 597. The 7th bequest, of \$50,000, is too remote, and subject to a condition which may not arise within the period limited by the rule as to perpetuities, viz., a demonstration, or proof, that certain institutions "shew that God's people are willing to help others to see the light," etc. He referred to Theobald, *op. cit.*, p. 367; *In re Bowen*, [1893] 2 Ch. 491; *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; *In re Wood*, [1894] 3 Ch. 381; *Edwards v. Edwards*, [1909] A.C. 275; and (on the question of perpetuity) *Kennedy v. Kennedy* (1911), 24 O.L.R. 183. This is not a present gift, but one on a condition to be fulfilled in the future, no limit as to time being fixed. The gift of \$10,000 to be used in lending to deserving people is not charitable, and is void as offending against the rule as to perpetuities. Reference was made to *Attorney-General for New Zealand v. Brown*, [1917] A.C. 393; *Thomson v. Shakespear* (1860), 1 DeG. F. & J. 399; *Carne v. Long* (1860), 2 DeG. F. & J. 75. The provision that the whole estate must be used "for God only" is not a disposition of the residue, but is merely confirmatory of the preceding specific gifts. He argued that the whole residue should be held for the next of kin. Reference was also made to *In re Nottage*, [1895] 2 Ch. 649, and *In re Clark's Trusts* (1875), 1 Ch. D. 497.

R. J. McLaughlin, K.C., and *T. H. Stinson*, for Mary Cameron and the Corporation of the Town of Bobcaygeon, said that one very important question under the will was whether there was a

general bequest to charity. They referred to Halsbury's Laws of England, vol. 4, p. 105, as to the legal meaning of "charity." The only statute which we have dealing with the subject is the Mortmain and Charitable Uses Act, and that applies only to real estate. A bequest for religious purposes is only *primâ facie* charitable. We must not look at what we may suppose to have been the intention of the testatrix, but at her intention as it is expressed in the will. They referred to *Williams v. Williams* (1835), 42 R.R. 269, 5 L.J.N.S. Ch. 84; *Ommanney v. Butcher* (1823), 24 R.R. 42, Turn. & Russ. 260; *Ellis v. Selby* (1835), 7 Sim. 352; *Kendall v. Granger*, 5 Beav. 300. A gift "to pious uses" is not necessarily charitable: *Heath v. Chapman* (1854), 2 Drew. 417, 425; *Re Zeagman* (1916), 37 O.L.R. 536. The cases of *Harris v. Du Pasquier* (1872), 20 W.R. 668, and *Cocks v. Mannors* (1871), L.R. 12 Eq. 574, are specially important. They also referred to *Re Joy* (1888), 60 L.T.R. 175; the *Pemsel* case, *supra*; *In re Macduff*, [1896] 2 Ch. 451; *Hunter v. Attorney-General*, [1899] A.C. 309—a very important case in which attention is specially directed by the Earl of Halsbury, L.C., to the error of the Court of Appeal in construing the testator's will according to what they conceived his general intention to be as gathered from other parts of his will, and so not interpreting the will, but making a will for the testator: see p. 315 *et seq.* They also cited *In re Gassiot* (1901), 70 L.J. Ch. 242; *In re Delany*, [1902] 2 Ch. 642; *Blair v. Duncan*, [1902] A.C. 37; *Grimond (or Macintyre) v. Grimond*, [1905] A.C. 124, a Scotch case, but one stating the same principle as is laid down in the *Pemsel* and other English cases; *In re Freeman*, [1908] 1 Ch. 720; *In re Davidson*, [1909] 1 Ch. 567; *Re Ogden* (1909), 25 Times L.R. 382; *In re Da Costa*, [1912] 1 Ch. 337, a case which followed the *Grimond* case; *Lyman v. Royal Trust Co.* (1916), 31 D.L.R. 757; *Dunne v. Byrne*, [1912] A.C. 407; *In re Raven* (1915), 84 L.J. Ch. 489; *In re White* (1915), 85 L.J. Ch. 368; *Re Doyle* (1914), 5 O.W.N. 911; *In re Ovey* (1885), 29 Ch. D. 560; *In re University of London Medical Sciences Institute Fund*, [1909] 2 Ch. 1; *In re Wilson*, [1913] 1 Ch. 314; Theobald, *op. cit.*, p. 356; Tyssen's Charitable Bequests, pp. 133, 151, 187. The bequest for Christian Science churches is void under the Mortmain and Charitable Uses Act. The money should be expended within the jurisdiction: *In re Mirrlees' Charity*, [1910]

App. Div.
1917
RE
ORR.

App. Div.
1917
RE
ORR.

1 Ch. 163. The affidavit filed on behalf of the United Charities puts them out of Court, as it shews that they are private charities, and so do not have the position of a public charity. As to the gift of \$50,000, it is too wide and vague to be supported, and offends against the rule as to perpetuities which must apply as at the time of the death of the testatrix. Similar considerations apply to the gift of \$10,000 for the purpose of lending to deserving people. There is no presumption against intestacy in favour of a charity. The direction that the whole estate must be used "for God only" is too wide and indefinite to be considered a good residuary devise for charitable purposes.

J. A. Paterson, K.C., for the next of kin of the father of the testatrix.

Daniel O'Connell, for the next of kin of the mother of the testatrix.

T. Stewart, for the executors and trustees.

Hellmuth, in reply, argued that the views of the Christian Scientists, following their teacher, Mrs. Eddy, were not pantheistic or anti-Christian in any sense, but were based upon the teaching of Christ in the New Testament. They are not breakers of the law, but a large and growing religious organisation, recognised by the statutes of the United States. He referred to *Thornton v. Howe*, 31 Beav. 14 (the *Southcote* case); *Dunne v. Byrne*, *supra*, at p. 411. The *Grimond* case was decided under Scotch law, which is not the same as the English law. There is nothing immoral or contrary to public policy in the tenets of Christian Science. The *Bowman* case strongly supports the contention of these appellants. As to the contention that the gift of \$50,000 is not a charitable bequest, he cited *Chamberlayne v. Brockett* (1872), L.R. 8 Ch. 206, *per* Lord Selborne, at p. 211, followed in *In re Swain*, [1905] 1 Ch. 669. The *Wallis* case, *supra*, is a strong authority as to the application of the doctrine of *cy-près*. His clients would be glad to consent to the allowance of an annuity to Mrs. Cameron. A scheme should be submitted for the purpose of carrying out the trusts of the will. The *Brown* case, cited by our opponents, does not help them. There was not there, as there is here, a provision in the will that the whole estate should be "for God only"—if there had been such a provision, it would no doubt have been held a good charitable will. Reference was made to *Re Huyck*, 10 O.L.R. 480.

November 12. MEREDITH, C.J.O.;—This is an appeal by the Church of Christ, Scientist, and those claiming under the provisions of the will of the testatrix, which, by the judgment of Sutherland, J., dated the 16th May, 1917, have been declared to be invalid, against that part of the judgment; and an appeal by Mary Cameron, claiming as next of kin of the testatrix, against the judgment in so far as it declares to be valid a bequest of \$10,000 to the Mother Church, Boston, to be used for spreading the truth, a bequest of \$10,000 towards the encouragement of building Christian Science Churches, and a bequest for the benefit of those who are endeavouring to uplift the needy in Chicago, "such as Miss Jane Addams, United Charities, and whatever may seem to require assistance."

App. Div.
1917
—
RE
ORR.
—
Meredith, C.J.O.

The judgment was pronounced upon an originating motion by the trustees and executors of the will for the construction of it.

The will is dated the 29th day of August, 1912, and is upon a printed form, filled up by the testatrix in her own handwriting, and it is as follows:—

"This is the last will and testament of me, Miss Mary H. Orr, presently residing at Bobcaygeon, Victoria county, Ontario, I hereby revoking all former wills at any time made by me, and being desirous of settling my affairs in the event of my decease, and having full confidence in the persons afternamed as trustees and executors, do hereby give, grant, assign, dispose, convey and make over to and in favour of Mr. George Silas Haddock, 9 Crawford St., Roxbury, Christian Science Practitioner, Mr. Alfred Farlow, 609 Berkley Building, Boston, Mass., Christian Science Practitioner, Mr. William C. Moore, Bobcaygeon, Ont., Manufacturer, and the survivor of them, as trustees and in trust for the purposes aftermentioned, the whole estate and effects, heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease, together with the whole writs and vouchers thereof; and I nominate and appoint the said Mr. George Silas Haddock, Mr. Alfred Farlow, Mr. William C. Moore, and the survivor of them, as they may appoint, to be my sole executors and trustees of this my will, but declaring that these presents are granted in trust always for the purpose aftermentioned, viz.: (First) I direct my executors and

App. Div.

1917

RE

ORR.

Meredith, C.J.O.

trustees to first pay my just debts, personal and testamentary expenses. (Second) I give, devise and bequeath unto:—

(1) "The Mother Church, Boston, ten thousand dollars to be used in spreading the truth—

(2) "Ten thousand dollars towards encouraging those building C.S. Churches, to be distributed in smaller or larger sums as may be wise, from \$100 to \$300 to each church—

(3) "Ten thousand to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually—

(4) "Ten thousand for the benefit of those who are endeavouring to uplift the needy in Chicago, such as Miss Jane Addams, United Charities, and whatever may seem to require assistance—

(5) "Five thousand to be used for any necessary or uplifting purpose among father's kin—

(6) "Five thousand to be used for any necessary or uplifting purpose among mother's kin—

(7) "Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor-houses, Gaols, and Penitentiaries or any place that is maintained for the uplifting of humanity—

(8) "Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms—This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilised as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in Science & Health with Key to the Scriptures by Mary Baker Eddy—

(9) "The whole of my estate must be used for God only.

"And I reserve my life-rent, and full power to alter, innovate, or revoke these presents in whole or in part. And I dispense with the delivery hereof. And I consent to the registration hereof for preservation.

"In witness whereof I have subscribed these presents written (in so far as not printed) by myself at Bobcaygeon this twentieth day of August nineteen hundred and twelve."

The testatrix died on the 24th day of June, 1916, leaving an estate of the value of \$202,000, and her debts, testamentary and funeral expenses, amounted to less than \$1,000. She was a member of the religious body known as Christian Scientists, and was very much interested in the spread of its doctrines, in the truth of which she evidently firmly believed.

The bequests given by the will are not numbered in it, but I have numbered them for convenience of reference.

The validity of all of these bequests, except of numbers 3, 5, and 6, is attacked by the appellant Mary Cameron; numbers 1 and 2 on the ground that these bequests are contrary to public policy, being for the spreading of views contrary to the common principles of human knowledge and for discouraging education and scientific investigation, especially in reference to sanitation and a scientific prevention and cure of disease; number 4 on the ground that it is not a charitable bequest and is void for uncertainty; number 7 on the ground that it is not a charitable bequest and is void for uncertainty, and that it is contingent upon the happening of events which may not happen within the limits of time prescribed by the rule against perpetuities, and is therefore void; number 8 on the ground that it is not a charitable bequest and is void for uncertainty; and number 9 on the ground that it is not a dispositive provision or a declaration of trust, and that, if it is one or the other of these, it is incapable of execution by the Court on account of its indefiniteness, and is therefore void.

The objections to bequests *numbers 1 and 2* are, in my opinion, not well-founded.

The Church Manual of the First Church of Christ, Scientist, and Science and Health with Key to the Scriptures, were put in evidence, and it is upon the statements which they contain that the appellant relies to support her contention as to the invalidity of these two bequests.

The important points or religious tenets of Christian Science will be found stated in Science and Health, p. 497, and in the Church Manual, pp. 15 and 16, and are as follows:—

“1. As adherents of Truth, we take the inspired Word of the Bible as our sufficient guide to eternal Life.

App. Div.
1917
RE
Orr.
Meredith, C.J.O.

App. Div.

1917

RE
ORR.

Meredith, C.J.O.

"2. We acknowledge and adore one supreme and infinite God. We acknowledge His Son, one Christ; the Holy Ghost or Divine Comforter; and man in God's image and likeness.

"3. We acknowledge God's forgiveness of sin in the destruction of sin, and the spiritual understanding that casts out evil as unreal. But the belief in sin is punished so long as the belief lasts.

"4. We acknowledge Jesus' atonement as the evidence of divine, efficacious Love, unfolding man's unity with God through Christ Jesus the Way-shower; and we acknowledge that man is saved through Christ, through Truth, Life and Love, as demonstrated by the Galilean Prophet in healing the sick and overcoming sin and death.

"5. We acknowledge that the crucifixion of Jesus and His resurrection served to uplift faith to understand eternal Life, even the allness of Soul, Spirit, and the nothingness of matter.

"6. And we solemnly promise to watch and pray for that Mind to be in us, which was also in Christ Jesus; to do unto others as we would have them do unto us; and to be merciful, just and pure."

There is nothing in all this, except possibly the statements as to the unreality of evil, and the nothingness of matter, which conflicts with the beliefs of the most orthodox Christian; but it is argued that the views of Christian Science are: (1) contrary to the common principles of human knowledge; and (2) discourage education and scientific investigation in reference to sanitation and a scientific prevention and cure of disease, and that the spreading of these views is contrary to public policy, and that a bequest for that purpose is therefore void.

I find difficulty in understanding what is meant by the expression "contrary to the principles of human knowledge." If what is meant is, "contrary to what is generally accepted as true," I know of no reason in law or in morals that forbids the propagation of views which are opposed to what is generally accepted as true. To deny the right to do this presupposes the infallibility of human judgment, and would bar the way to progress in every direction, scientific and otherwise.

The second objection is also, in my opinion, untenable. I will assume that, if what is taught were that education and

scientific investigation, especially in reference to sanitation and a scientific prevention and cure of disease, were useless, and nothing were put forward as a substitute for them, the objection would be entitled to prevail; but I fail to see why those who entertain such views may not promulgate them, if they put forward something which they believe will accomplish the end which the means they believe to be useless are designed to attain. It is not for the Court to pass judgment on their views. They may be opposed to those entertained by the vast majority of mankind, and may seem to them erroneous or even foolish, but that affords no ground for holding that the teaching of them is contrary to public policy or unlawful.

As was said by the Master of the Rolls (Sir John Romilly) in *Thornton v. Howe*, 31 Beav. 14, 135 R.R. 324, 327:—

“The Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests.

“Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void.”

With this I entirely agree. It is, in my opinion, both good sense and good law.

Rex v. Lewis, 6 O.L.R. 132, was referred to by Mr. Armour. It was decided in that case that it is a criminal offence for a person who, as parent, guardian, or head of a family, is under a duty imposed by the Code to supply necessities to one under his charge, who is unable from sickness to withdraw himself from such charge, to omit without lawful excuse to supply them, and that the belief of the accused, who was a Christian Scientist, that mental treatment, according to the creeds of his sect, was the proper treatment for his sick child, was not a lawful excuse within the meaning of the statute.

It was contended by Mr. Armour that Christian Scientists believe and teach that what was done by the defendant in that case was the right and proper thing to do, and that the effect of their practice and teaching is to disregard these requirements of

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

App. Div.
1917
—
RE
ORR.
—

Meredith, C.J.O.

the law, and in effect to counsel violations of the criminal law, and that the body is therefore an illegal one, or at all events one in whose favour the Court will not execute a charitable trust.

I do not think that this case helps the contention of the appellant; the reason why the excuse relied upon was not a lawful excuse was, as is pointed out in the case, that "the law of the land must be obeyed, and it must be obeyed even though there be something in the shape of belief in the conscience of the person which would lead him to obey what in his state of mind he may consider a higher power or higher authority:" *per* Moss, C.J.O., at p. 138.

There is nothing in Science and Health, or in the tenets of Christian Scientists, which counsels or even suggests disobedience to the law of the land, and, as Osler, J.A., said (p. 141): "Persons *sui juris* may by mutual consent, and within certain limits, practise upon each other what experiments of this kind they please, and in some instances and in some kinds of disorders, where the mind of the patient is responsive to the treatment, it may possibly be done with beneficial results."

If counsel for the appellant is right in his main contention on this branch of the case, Mr. Justice Osler, in giving expression to these views, must have been guilty of spreading views that are open to the objection which is raised against the teaching of Christian Scientists.

A perusal of Science and Health leads me to think that the principles that are laid down with regard to sanitation and disease are those which, according to the belief of the authoress, will be accepted "when the advancing age admits the efficacy and supremacy of mind" (p. 401).

I am unable to see why the effort of Christian Scientists to attain that end may not be seconded by such teaching as that which is contained in Science and Health; and I do not doubt that, if the result of the teaching should be to secure the general adoption of their views, treatment of disease by their methods would become a proper means of providing for the sick for the purposes of the Code; but, even if that would not be the result, I see no reason why Christian Scientists may not seek to convert mankind to their views, and to bring about a change in the law

which would provide for the recognition of their efforts as a mode of treatment of disease that might lawfully be employed by those who, by the existing law, are required to provide necessaries for the sick.

Gift number 4.

In *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531, 583, 7 Times L.R. 657, Lord Macnaghten said:—

“‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.”

This classification is, as pointed out by Lindley, L.J., in *In re Macduff*, [1896] 2 Ch. 451, 467, 12 Times L.R. 452, obviously a paraphrase of what was said by Sir Samuel Romilly in argument in *Morice v. Bishop of Durham* (1805), 10 Ves. 522, 532, which was:—

“There are four objects, within one of which all charity, to be administered in this Court, must fall: 1st, relief of the indigent; in various ways: money: provisions: education: medical assistance; etc.: 2ndly, the advancement of learning; 3rdly, the advancement of religion; and, 4thly, which is the most difficult, the advancement of objects of general public utility.”

The Lord Justice also pointed out, pp. 466, 467, that Sir Samuel Romilly did not say that anything which comes under any one of these four heads must be a charity; that may be so or may not be so, but they must all come within one of them, and said that Sir Samuel Romilly did not mean, and that he was certain that Lord Macnaghten “did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be.”

In *In re Good*, [1905] 2 Ch. 60, 66, Farwell, J., expressed the opinion that every one would agree with the Lord Justice’s criticism of Lord Macnaghten’s judgment, that he did not intend to say that every object of public utility is necessarily a good charity. “But there is no doubt,” said he, “that many objects are charitable because they are of public utility. Some objects of public utility are charitable, though not all, and the question is whether within the purview of the statute of Elizabeth this particular object” (*i.e.*, the one he was dealing with) “is or is not a charity.”

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

App. Div.

1917

RE

ORR.

Meredith, C.J.O.

I have no doubt that these views of Lord Justice Lindley and Farwell, J., have been accepted as correct in English cases, and that according to English law a gift is not necessarily charitable because it is for the advancement of an object of general public utility.

I do not think, however, that the English cases as to Lord Macnaghten's fourth head have any application in this Province, since the passing of the Mortmain and Charitable Uses Act, now R.S.O. 1914, ch. 103.

Section 2 (2) of that Act provides that:—

“(2) The following shall be deemed to be charitable uses within the meaning of this Act:

- (a) The relief of poverty;
- (b) Education;
- (c) The advancement of religion; and
- (d) Any purpose beneficial to the community, not falling under the foregoing heads.”

The original provincial Mortmain and Charitable Uses Act was 2 Edw. VII. ch. 2.

In framing this Act, the Legislature followed in the main the provisions of the Imperial Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. ch. 42), but departed from it in what appears to me to be an important particular.

Sub-section 2 of sec. 13 of the Imperial Act contains a recital of the preamble to the statute of Elizabeth (43 Eliz. ch. 4), and that “in divers enactments and documents reference is made to charities within the meaning, purview, and interpretation” of that Act; and it provides that “references to such charities shall be construed as references to charities within the meaning, purview, and interpretation of the said preamble.”

The provincial Act did not contain any provision similar to sub-sec. 2 of sec. 13, but contained a provision (sec. 6) beginning, “The following shall be deemed to be valid charitable uses within the meaning of this Act,” followed by an enumeration of substantially all the objects mentioned in the preamble to the statute of Elizabeth, and concluding with the words, “and any other purposes similar to those hereinbefore mentioned,” and by it the same Acts as were repealed by the Imperial Act were repealed, and among them the statute of Elizabeth.

The effect of this legislation was probably to introduce the English law for determining what are charitable trusts.

By 9 Edw. VII. ch. 58, this provincial Act was repealed and replaced by an Act containing substantially the same provisions as were contained in the repealed Act, except in one respect, and that was the substitution of the sub-section I have quoted for sec. 6 of the repealed Act, and this new Act now forms ch. 103 of the Revised Statutes of 1914, which is simply a revision of it.

The course of provincial legislation leads clearly, I think, to the conclusion that the Legislature of Ontario adopted this latter change in the law for the purpose of preventing the English doctrine to which I have referred from being applied in Ontario in determining whether any purpose beneficial to the community, not being the relief of poverty, education, or the advancement of religion, was in the legal sense a charitable purpose.

However that may be, there is no room for construing sub-sec. (2) of sec. 2 of the provincial Act as Lord Justice Lindley interpreted what was said by Lord Macnaghten and by Sir Samuel Romilly. It is an express declaration that the purposes which it enumerates shall be deemed to be charitable uses within the meaning of the Act; and the Courts of this Province are, in my opinion, warranted in looking to it, as the Courts in England look to the statute of Elizabeth, for the purpose of determining what in law is a charitable gift in the case of personalty, to which the provision does not apply. It would be strange indeed if a gift of land would be charitable because the object of it came within this provision, and a gift of personalty for the same object would not be charitable because of the rule of law adopted in England.

If I am right in this view, the 4th bequest is, I think, clearly a charitable one and valid.

Whether the language of the testator is to be read as meaning that the money she bequeaths is given to the persons or bodies, such as Miss Jane Addams and United Charities, who are endeavouring to uplift the needy in Chicago or is to be applied in that work by these persons or bodies, the gift is, if not for the relief of poverty, at all events a gift for a purpose beneficial to the community, and therefore a charitable bequest.

It is difficult to understand what is meant by the words, "and whatever may seem to require assistance" at the end of this

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

bequest, but I am inclined to think that what the testatrix meant was, that only those persons or bodies that seemed to the trustees and executors to require assistance should be helped.

I am of opinion that, if the gift were not charitable, it might be upheld as one for the benefit of persons or bodies to which the testatrix refers, as was the bequest in question in *Cocks v. Mannors*, L.R. 12 Eq. 574, and as were the bequests in cases similar to that case.

It is not important what conclusion is reached as to this bequest, so far as the bequest itself is concerned; for the appellant Mary Cameron, on the argument, consented to the gift being upheld, and the money bequeathed being divided between Miss Jane Addams and United Charities. I have discussed the effect of it because of the light it may throw on the 9th bequest, with which I shall deal later on.

I may add that, even according to the English rule, this bequest would seem to be a charitable bequest, for the reason that in *In re Allen*, [1905] 2 Ch. 400, 21 Times L.R. 662, the bequest in question there was held to be a good charitable bequest.

7th gift.

As I have said, this bequest is attacked on the ground that it is not a charitable bequest, and is therefore void for uncertainty, and the further ground that it is contingent upon the happening of events which may not happen within the limits prescribed by the rule against perpetuities, and is for that reason also void.

The rules of law applicable for the determination of this question are well-settled, and the only difficulty is in the application of them to the facts of particular cases.

These rules are:—

1. The rule against perpetuities does not apply to charitable trusts.

2. Where there is an immediate and effectual gift to charity, no question of remoteness can arise, although the particular object will not necessarily take effect within any assignable limit of time, and may never take effect at all.

3. Where the gift to charity is not immediate, but conditional upon the happening of some event, the estate does not arise unless the condition is fulfilled. In that case the charitable gift must take effect within the limit allowed by the rule against per-

petuities, and if it may by any possibility exceed that limit it is void *ab initio*.

The case at bar, as far as the question as to the application of the rule against perpetuities to the provision I am considering is concerned, in my opinion falls within the second of these rules.

The case, in my opinion, is, as to this provision, on all-fours with *Chamberlayne v. Brockett*, L.R. 8 Ch. 206. In that case the testatrix, after giving various legacies, mostly charitable, proceeded as follows: "As I consider all my family the same to me, I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ I feel I am doing right in returning it in charity to God who gave it. I therefore give and bequeath all the rest, residue, and remainder of my personal estate . . . unto my said brothers . . . upon trust." Then followed a direction to the trustees as to conversion and investment, and then a direction that the trustees should stand possessed of the residue upon trust to pay several small sums, and then the will proceeded as follows: "And my further will and desire is, when and so soon as land shall at any time be given for the purpose as hereafter mentioned, that an almshouse or almshouses, consisting of ten rooms with suitable appendages for ten poor persons, should be built in the parish of Southam, in the county of Warwick; also an almshouse or almshouses, consisting of five rooms with suitable appendages for five poor persons" (and a similar direction as to two other almshouses), "all to be built in a plain substantial manner, no expensive ornament whatever."

It was argued that this trust was void for remoteness, and that there is nothing to protect a gift which does not devote the property to charity until the happening of a future event, which may be beyond the period allowed by the rule against perpetuities.

In stating his opinion, the Lord Chancellor (Selborne) said (p. 212): "The intention in favour of charity is absolute, the gift and the constitution of the trust is immediate; the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied." And he held that the case was completely governed by *Attorney-General*

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

App. Div.

1917

RE

ORR.

Meredith, C.J.O.

v. *Bishop of Chester* (1785), 1 Bro. C.C. 444, *Sinnett v. Herbert* (1872), L.R. 7 Ch. 232, and the other authorities of that class, and that the residue of the personal estate of the testatrix was well given to charity.

In re Swain, [1905] 1 Ch. 669, affords another illustration of the application of the same principle. In that case the testator gave his residuary estate to a trustee upon trust to form a reserve fund for the purposes thereafter mentioned, and to pay the balance of the income of the residuary estate, after payment of outgoings, to his niece during her life, and after her death to pay the income (after payment into the reserve fund every quarter of a year of ten per cent. of the income and certain outgoings), by equal monthly payments, to three annuitants, for their respective lives, who should be poor inhabitants of Maidstone, and he directed that the annuities should not become payable until the reserve fund should amount to £400—that the reserve fund should be invested and only used in case of dire need, but be always kept up to £400. It had been held by Buckley, J., that the direction to form a reserve fund was bad for uncertainty, but his decision was reversed by the Court of Appeal, which held that, subject to the life estate, the residue had been effectually devoted to charity as from the testator's death, and that the direction to postpone the payment of the annuities until the reserve fund reached £400 was not a condition precedent to the charitable gift coming into effect, but was only a direction as to the particular application of the charitable fund and intended to secure the beneficial working of the charity, and that the case, therefore, fell within the second principle in *Chamberlayne v. Brockett*—also that the reserve fund was equally devoted to charity.

Wallis v. Solicitor-General for New Zealand, [1903] A.C. 173, affords another illustration of the application of the principle, though it is more directly applicable to another branch of the law as to charitable trusts.

In the case at bar, the intention in favour of charity is absolute, the gift and the constitution of the trust is immediate, and the only thing that is postponed or made dependent upon future and uncertain events is the particular mode or form of charity to which the testatrix wished her property to be applied. The intention in favour of charity is, for the reasons I shall mention when I

come to deal with the 9th gift, found in the provision that the whole of the estate of the testatrix "must be used for God only," aided to some extent perhaps by the other provisions of the will; and it is absolute. There is an immediate gift to the trustees and executors of the whole of the estate upon trust, and one of these trusts is to use it for God only—and therefore the gift and the constitution of the trust are immediate, the only thing that is postponed or made dependent upon future and uncertain events, if anything is so dependent, is the particular form or mode of charity to which the \$50,000 which the trustees are to hold as a fund to be applied.

The fact that in the *Chamberlayne* case it was the application of the whole of the residuary estate which was postponed, while in the case at bar it is only a part of it, can make no difference as to the application of the principle of the decision.

I have suggested that the direction as to the \$50,000 may not be dependent upon future and uncertain events. It is perhaps difficult to determine what the testatrix meant; but the provision is, I think, fairly open to the construction that what is meant is, that the help should be given to institutions to enable them to demonstrate "that God's people are willing to help others to see the light that is so real, near and universal for all who will receive," the effect of which the testatrix believed would do away with hospitals and the other institutions she mentions.

Having in mind that the testatrix was a Christian Scientist, it is but reasonable to think that what she had in view was the dissemination of the principles of the sect to which she belonged, the general acceptance of which she and the other members of the sect believed would result in such institutions as she appears to have thought would then be displaced, being no longer necessary.

This gift may also be supported, I think, as a charitable bequest coming under the 4th head mentioned in sec. 2 (2) of the Mortmain and Charitable Uses Act.

Any purpose that will make unnecessary hospitals, poor-houses, gaols and penitentiaries, is certainly in the highest sense a "purpose beneficial to the community."

8th gift.

I have with some hesitation reached the conclusion that this bequest is void.

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

App. Div.

1917

RE
ORR.

Meredith, C.J.O.

If the latter part of the provision could be read as meaning that the profits are to be applied in the dissemination of the principles of Christian Scientists, I would be inclined to hold that that was the primary purpose of the testatrix, and the provision as to lending the money subsidiary only, and designed, while providing for the way in which the fund must be invested in order to secure an income, to benefit deserving people.

The language used by the testatrix is so vague and indefinite that I am unable to construe it in that way.

9th provision of the will.

I have come to the conclusion that this is a valid declaration of trust as to the estate of the testatrix not effectually disposed of by her will.

The rule to be applied in determining whether what is relied upon as a testamentary disposition is void for uncertainty as to the subject of the disposition or the object of the gift, was stated by Jessel, M.R., in *In re Roberts* (1881), 19 Ch.D. 520, 529. He there says: "The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."

I take it to be the law, notwithstanding that there are earlier cases which point the other way, that there is a presumption that a testator does not intend to die intestate as to any part of his property: *Goodman v. Goodman* (1847), 1 DeG. & Sm. 695, 699; Jarman on Wills, 6th ed., p. 454, and note (d) on that page. On the same page, Mr. Jarman cautions the student "against yielding implicit confidence to any early cases, in which a gift has been held to be void for uncertainty, the principle whereof has not been recognised in later times." See also *May v. Logie* (1896), 23 A.R. 785.

Even so early as Car. II., where the language was, "I give all to my mother, all to my mother," the only question raised was as to whether the words were sufficient to pass lands, and it was held that they were not: *Bowman v. Milbanke* (1675), 1 Lev. 130, 1 Sid. 191, T. Raym. 97, 1 Keble 719.

Referring to this case, Malins, V.-C., said in *Smyth v. Smyth* (1878), 8 Ch.D. 561, 567, that, if the words in that case did not

pass all the testator had, he could not conceive what they did pass, adding: "However, such a decision as that cannot be considered an authority now."

The question for decision is: are the words "The whole of my estate must be used for God only" sufficient to declare the trust upon which the trustees and the executors appointed by the will are to hold so much of the estate devised and bequeathed to them as has not been disposed of by the earlier provisions of the will? It will be convenient first to consider this question apart from the question whether the object of the trust, if there be a trust, is so uncertain that it is on that ground invalid.

In the early part of the will, the testatrix states the object with which she is making it to be for the purpose of settling her affairs. She then proceeds to "give, grant, assign, dispose, convey and make over" to her trustees and executors "the whole estate and effects, heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease, together with the whole writs and vouchers thereof"—words as comprehensive as possibly could have been used—and all this is given to the trustees and executors "in trust for the purposes aftermentioned." Then follows a declaration that "these presents are granted in trust always for the purpose aftermentioned, viz:" then follow the dispositions of the will, and they consist, first, of a direction to the trustees and executors to pay debts etc., followed by the other dispositions which are preceded by the words "(Second) I give, devise and bequeath unto:" then follow 8 dispositions of various sums amounting in the whole to \$110,000; and then come the words which I am now considering; and there are no other dispositive provisions in the will.

The estate of the testatrix was proved at \$202,000, and the debts and funeral and testamentary expenses amounted to less than \$1,000; so that, if the provision in question is not effective, the testatrix died intestate as to nearly one half of what she possessed at the time of her death. It was said in argument, but I am not aware of any evidence which supports the statement, that the estate of the testatrix had very much increased in value between the time when her will was made and the time of her death. Assuming that to have been the case, there is nothing to shew that her estate was not, at the time of the making of her will, to her

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

knowledge, of a value far in excess of the sums which she was disposing of by the specific gifts she was making. In any case it is inconceivable that the testatrix did not know that there would be a very substantial surplus after paying her debts and funeral expenses and the sums she was directing to be applied for specific purposes, and that, if she should make no disposition of this surplus, she would die intestate as to it.

It is not unimportant to bear in mind that the will was drawn upon a printed form, which was filled up by the testatrix in her own handwriting; and, bearing this in mind, what was more natural than that the testatrix, having provided for the benefactions in which she was specially interested, should have gone on to provide for what was to be done with what remained, and to leave to the discretion of her trustees and executors the objects to which it was to be applied, limiting those objects to such as should come within the meaning of the expression "must be used for God only?"

The presumption to which I have referred, and the well-settled rule that any language which a testator uses which reasonably may be treated as an expression of his intention as to the disposition to be made of his property, is effective to dispose of it in the manner indicated, require the Court to hold that the provision with which I am now dealing is an effective declaration of the trusts upon which the property of the testatrix which should remain after satisfying the earlier gifts is to be held by the trustees and executors, unless the object of the gift is so uncertain that effect cannot be given to it.

It may be suggested that all that the testatrix meant by the provision in question was, that the preceding bequests should be "used for God only;" but that view cannot, I think, be supported. The words "the whole of my estate" are inconsistent with it, as is also the fact that the testatrix had already carefully directed the purposes to which the money she had bequeathed should be applied, and it is highly improbable that, having done that, she would have thought of restricting the use to which these benefactions should be put by the much looser expression that they "must be used for God only."

There remains to be considered the question whether the object of the trust is sufficiently declared, and the trust is a charitable trust, for otherwise it is undoubtedly invalid.

In *Powerscourt v. Powerscourt*, 1 Molloy 616, Beatty 572, the trust was to lay out, in the discretion of trustees, £2,000 per annum, till the testator's son came of age, "in the service of my Lord and Master, and I trust Redeemer;" and it was held by Mannors, L.C. (Ireland), that this was a good charitable gift.

App. Div.
1917
RE
ORR.
Meredith, C.J.O.

In *Felan v. Russell*, 4 Ir. Eq. R. 701, the bequest was of the residue of the personal property of the testatrix to William Russell, "to be by him applied for such pious purposes and uses as should appear to him to be most conducive to the honour and glory of God and the salvation of my soul;" and it was held that it was a good charitable bequest.

Powerscourt v. Powerscourt was followed by Stirling, J., in *In re Darling*, [1896] 1 Ch. 50. The gift there was "to the poor and the service of God." It was argued that, though a gift for the benefit of the poor is a good charitable gift, a gift for the service of God is not—that the service of God includes much that is not religious. Delivering judgment, Stirling, J., said that that was true in a sense, but that he had to construe the will according to the ordinary meaning of the language of English testators, and that he thought that when "the service of God" is spoken of as it was in the will, no one so construing the expression would hesitate to say that service in a religious sense was intended.

In *Phelps v. Lord*, 25 O.R. 259, it was held that a gift by will of the testator's residuary estate to trustees to be used to further the cause of our Lord Jesus Christ was not void for indefiniteness, but was a good charitable gift.

These cases are sufficient, I think, to support my conclusion that the trust declared by this provision is a good charitable bequest, and I have less hesitation in giving to it the meaning that the residue is to be applied to religious purposes, because the words are used by a Christian Scientist, the tenets of whose sect as well as her own belief make the adoption of the religious views of the sect the cure of all the ills of mankind; and, therefore, from her mouth, the words "used for God only" seem to me to lend themselves readily and naturally to the interpretation "used for religious purposes."

If I am right in thinking that the 9th bequest is a good charitable bequest for religious purposes, it follows that, if any of the previous bequests are invalid, the money bequeathed by them falls

App. Div.
1917

RE
ORR.

Meredith, C.J.O.

into the residue, and is impressed with the trust for religious purposes, and that the Court will execute the trust and administer the fund by means of a scheme, the indefiniteness of the objects of the gift being immaterial and not in any way affecting its validity.

The question whether, if a gift is for a charitable purpose, it lapses, depends upon whether the testator's intention was to promote some specific and well-defined purpose and that only, or there is a general charitable intention which the testator wishes to carry out in a particular way. In the former case the gift fails if the purpose cannot be carried out, and in the latter the fund will be applied *cy-près*: Theobald on Wills, 7th ed., pp. 373, 375; *In re Wilson*, [1913] 1 Ch. 314, 320, 321.

This statement of the law was adopted by Kennedy, L.J., in *In re University of London Medical Sciences Institute Fund*, [1909] 2 Ch. 1, 9, and is, no doubt, accurate.

The will in question falls, I think, within the latter part of the statement, and in it the testatrix evidences a general charitable intention which she wished to carry out in the particular ways she indicates, and not to promote specific and well-defined purposes and them only.

I would, for the reasons I have given, dismiss the appeal of the appellant Mary Cameron, and allow the appeal of the other appellants, and declare that the 4th, 7th, and 9th bequests are valid and effectual, and that the 8th bequest falls into the residue; and I would refer it to the Master to propound a scheme for the application of the residuary estate.

The costs of all parties should be paid out of the residuary estate; those of the trustees and executors between solicitor and client.

The Attorney-General for Ontario was not notified of the proceedings in the Court below or of the appeals, and was not represented, but since the argument has sent to the Registrar a memorandum in which he says that "he adopts the view that there was a general intention of charity, and is prepared, in conjunction with the trustees in the will of the late Mary H. Orr, to propound a scheme for administration of the funds if the Court decides in favour of the view that there is a charitable intention shewn."

MACLAREN and MAGEE, JJ.A., and LENNOX, J., agreed with the Chief Justice.

FERGUSON, J.A. (after stating the scope of the appeals, setting out the will, and stating the effect of the judgment below):— Counsel for the charities and religious institutions argue that these words, “The whole of my estate must be used for God only,” are the controlling or governing declaration of the testatrix, affecting every part of her estate, and declaring a general charitable intention in reference thereto, and are sufficient to impress every part of the estate in the hands of the trustees with a trust for charitable purposes, and if the purposes are not definitely declared or if they are declared so indefinitely as to make it impossible to ascertain or carry out the exact purposes of the testatrix, or if the purposes or some of them fail, yet the Court must dispose of the estate for charitable purposes under the *cy-près* doctrine.

The appellants’ counsel further contend that, if these words can be construed as a declaration of a general charitable intent, then all the specific gifts which might fail because of vagueness or indefiniteness, or because they offend against the perpetuity rule, fall under the protecting mantle of this general and controlling declaration, and must be declared to be good charitable bequests and be administered by the Court under the doctrine of *cy-près*.

Counsel for the respondents in the main appeal, and for the appellants in the cross-appeal, urge that the words of the bequest, numbered 9, are too vague and indefinite to be given any effect, and also that they are too wide and would permit the moneys to be expended for not only charitable purposes, as that term is used in the Courts of Chancery, but for purposes beyond charitable purposes so understood, such as benevolent or philanthropic purposes, and that the gift fails because it is: (a) too vague and indefinite; (b) not confined to charitable purposes, as that term is defined by the Courts of Chancery,

As to gifts Nos. 1 and 2, the respondents contend that the Christian religion is part of our law, that the teachings of the Christian Science Church are contrary to the Christian religion, as that term is understood in this Province, and are contrary to the law of this Province, in that they teach that medical aid is not necessary and should not be called in, and also that No. 2 offends the rule against perpetuities; that gift No. 3 is not a charitable gift any more than the gift to a bishop for the use of his diocese was in *Re McCauley*, 28 O.R. 610, but is a gift to an indefinite

App. Div. -
1917

RE
ORR.

Ferguson, J.A.

App. Div.

1917

RE

ORR.

Ferguson, J.A.

number of persons, and void; and also that the words "for whatever requires assistance" do not necessarily confine the required assistance to charitable purposes, in the legal and technical sense in which these words are used in Courts in construing wills, but may allow such assistance to be extended to benevolent or philanthropic objects which might not be charitable. As to gifts Nos. 5 and 6, all parties are, by agreement of counsel, content that the declaration in the Court below should stand, provided, however, that the agreement is not to be taken as affecting our opinion in construing the other paragraphs of the will. As to gifts Nos. 7 and 8, it is contended that they are void because of their vagueness and because they offend against the perpetuity rule.

If the words in bequest numbered 9 should be given any effect, they must, I think, affect the whole will and every bequest therein. In the judgment appealed from they are, as being too vague and indefinite, given no effect. The Courts have held sufficient, definite, and certain as to purpose, gifts and bequests for "the service of God:" *In re Darling*, [1896] 1 Ch. 50; for "the service of my Lord and Master, and I trust Redeemer:" *Powerscourt v. Powerscourt*, 1 Molloy 616; "to further the cause of our Lord Jesus Christ:" *Phelps v. Lord*, 25 O.R. 259.

In *In re Darling*, [1896] 1 Ch. 50, a direction that part of the testator's estate should be applied to "the service of God" was held to be a good charitable bequest, as being a direction to apply that property for charitable purposes in a religious sense. In that case, Stirling, J., after quoting the bequest, says (p. 52):—

"The argument is that . . . a gift for the service of God is not a good charitable gift. It is said that the service of God includes much that is not religious. In a sense that is true. There is an ancient document which we sometimes hear recited in which the congregation are invited to beg a blessing upon all schools and seminaries of sound learning and religious education, so that 'there may never be wanting a due supply of persons fitly qualified to serve God both in Church and State.' The distinction is drawn, therefore, between Church and State, but the persons referred to are alike spoken of as serving God therein. In a certain sense, therefore, acts which are not religious are said to be in the service of God. But I have to construe this will according to the ordinary meaning of the language as used by English testators; and I think

that when 'the service of God' is spoken of as it is in this will, no one so construing the expression would hesitate to say that service in a religious sense was intended—service similar to such service as is referred to when in the document which I have mentioned service in the Church is spoken of."

Adopting and following the reasoning in that case, I would, if the case at Bar were a simple bequest to the trustees, followed by the direction contained in the bequest numbered 9, "*The whole of my estate must be used for God only*," be of opinion that this testatrix intended and directed her trustees to apply her estate for the "use" of God in a religious way; that, just as "service" in the *Darling* case was construed to be religious "service," so "use" in this case would be construed to be a religious "use." The authorities before referred to shew that such a gift for religious purposes is equally a gift for charitable purposes. See also Halsbury's Laws of England, vol. 4, p. 112, and the Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103, sec. 2.

But this is not the simple case of bequest number 9 standing alone; there are eight other bequests; and it is argued that one or more of these are not confined to religious purposes, or even charitable purposes, and that it follows that the testatrix has thus for herself interpreted the words of the bequest in number 9, so as to include purposes not charitable in a technical sense; and, it being impossible to divide the estate which would be dealt with under number 9 only, between objects which are charitable in a legal sense and those that are not, and thus to separate the good from the bad, the whole gift (9) fails; and that, therefore, the words of the gift cannot be given any effect, even for the purpose of influencing the construction to be put upon the specific bequests.

It is, for these reasons, necessary to consider each of these specific bequests to see if they in themselves are plainly not religious bequests or charitable bequests in the legal sense; for it would seem to follow that, if these bequests or some of them are not religious or charitable, and yet were in the mind of the testatrix bequests "for the use of God only," she must have used that expression in a sense which did not confine its purposes to charitable purposes, as that expression is used by the Courts; or, in other words, her own interpretation did not confine the "use" to charitable purposes, but may permit the use to be ex-

App. Div.
1917
—
RE
ORR.
—

Ferguson, J.A.

App. Div.
1917

RE
ORR.

Ferguson, J.A.

tended to purposes which are outside of or beyond the meaning attached to that expression when used by lawyers or Courts—such as benevolent purposes—with the result that the respondents' contention should prevail: *Morice v. Bishop of Durham* (1804-5), 9 Ves. 399, 405, 10 Ves. 522, 537; *Williams v. Kershaw* (1835), 5 Cl. & F. 111; *In re Jarman's Estate* (1878), 8 Ch.D. 584; *In re Macduff*, [1896] 2 Ch. 451.

On the other hand, if these bequests are not in intent inconsistent with the meaning which I have said I think, on the reasoning of the *Darling* case, should be attached to the words in bequest number 9, then the appellants' contention should prevail: *Attorney-General v. Herrick* (1772), Ambl. 712, and cases collected in Halsbury's Laws of England, vol. 4, p. 155, para. 251. If, however, we are in doubt as to which interpretation should be placed upon the bequests, then we should lean in favour of an interpretation that will sustain the bequests as being charitable: Halsbury, vol. 4, p. 153, para. 245; *Weir v. Crum-Brown*, [1908] A.C. 162, 167.

The Judge in the Court below has found all the bequests to be of a charitable nature excepting 5 and 6; and these, if read along with and by the light of the words of number 9 read as a controlling declaration, would, I think, also be held to be for religious charitable purposes, in that they could then be read: "\$5,000 to be used for any necessary *religious* purpose or *religious* uplifting among father's kin" (or mother's kin as the case may be).

As to gifts 7 and 8, the learned Judge in the Court below does not in his opinion say that the intent of these gifts is not religious or charitable, but that the objects of charity are indefinite and vague, and the time of application is also so indefinite as to transgress the rule against perpetuities. There is, as I read them, nothing in either or both of these bequests so inconsistent with a religious and charitable intent that it would be unreasonable to give the words of gift number 9 the interpretation I have suggested. In fact, as I would interpret the specific bequests, they all evidence a religious and charitable intent, and have the effect on my mind of strengthening, rather than weakening, my opinion that the "use" declared in bequest number 9 is a religious charitable "use;" and I would therefore declare that the testatrix has, by this declaration, numbered 9, manifested a general charitable

intent, and impressed upon the whole of her estate in the hands of her trustees a trust requiring each and every part of it to be used for religious charitable purposes, within the meaning attached to that term by the Courts of Chancery. By adopting this construction, we should be giving effect to well-established rules of construction, in that effect would be given to all the words of the will; the words and terms used would not be measured separately, but each in relation to the entire provisions of the will, and each restricted and made subordinate to the main charitable intent; the last provision would be declared to control the preceding provisions; intestacy would be avoided; and benign treatment would be accorded to a charitable intent.

I shall now deal with the specific bequests, and the several objections to each.

As to bequest number 1, the learned Judge appealed from, after considering the evidence, has concluded that the bequest is for the advancement of religion, and says that he has not found anything in the exhibit "Science and Health with Key to the Scriptures" by Mary Baker Eddy, which is contrary to law. I read this book some time ago, and I do not recall anything therein, and nothing has been pointed out, to change my opinion that Christian Science as taught in Mrs. Eddy's book does not require or teach its followers to disobey any civil or criminal law of the land, and it cannot be successfully argued that there is anything in that book which is blasphemous and criminal, as the offence of blasphemy is explained by *Bowman v. Secular Society Limited*, [1917] A.C. 406; nor do I think that it can be successfully argued that, because Christian Science is a religion which, as I understand its teachings, does not recognise the doctrine of the Trinity, a Christian Science church or society cannot be the beneficiary of a religious charitable bequest. Lord Parker, in the *Bowman* case, points out (p. 450) that, while bequests for the purposes of religion have always been recognised in Equity as good charitable bequests, there is no express authority limiting such religion to the Christian religion, and that, apart from statutory disability, there never was anything inconsistent with public policy in enforcing a trust for the benefit of the Jewish religion. If this statement, which in the same case is adopted and approved of by Lord Buckmaster (p. 472), be taken as law, it follows that, apart from

App. Div.
1917

RE
ORR.

Ferguson, J.A.

App. Div.
1917

RE
ORR.

Ferguson, J.A.

statutory disabilities, there is nothing contrary to public policy in enforcing a trust for the Christian Science religion, even if it could be held that it taught that Jesus Christ is not divine.

I would therefore dismiss the appeal as to 1 and 2, but subject to what I shall have to say hereafter as to the effect of the rule against perpetuities on the validity of number 2.

As to gift number 3, there is no appeal.

As to gift numbered 4, I am of the opinion that, if we read this gift in the light of number 9 as an effective controlling declaration of religious charitable intent, "whatever" means "whatever religious charitable work," and that the learned Judge has arrived at the proper result, and I would dismiss the appeal.

As to gifts numbers 5 and 6, the parties have reached an agreement.

As to gifts numbers 7 and 8, I am of the opinion that, standing alone, these two bequests would, as being too vague and indefinite as to objects and general or particular charitable intent, fail as charitable bequests, but, when read along with the general charitable intent declared by 9, they fall under its protection and should be administered by the Court *cy-près*.

The conclusion that any specific gift that fails, falls under and is governed by the 9th declaration or bequest, being reached, the argument in reference to gifts numbers 7 and 8 offending the rule against perpetuities becomes unimportant; were the specific gifts to stand and be construed alone as gifts intended for designated charities, I should be of the opinion that, so far as that rule is concerned, gifts numbered 2 and 8 would be within the first subdivision, and 7, as contingent on "demonstration," within the second subdivision, in the following statement of the law, taken from the argument in *In re Swain*, [1905] 1 Ch. 669, at p. 672:—

"First, an immediate and valid gift to charity is not rendered invalid by its actual application being indefinitely suspended or in abeyance or incapable of being used for the particular purpose intended; in that case the rule against perpetuities is not applicable, and if strict compliance with the testator's directions is impracticable the Court may apply the fund *cy-près*. Secondly, if the gift intended for charity is in itself conditional—if it is so remote and indefinite as to transgress the rule—the gift fails *ab initio*."

But, reading number 9 as a declaration of general charitable

intent, as distinguished from the particular intent of the 7th gift itself, we overcome the contingency of "a demonstration," and have an immediate gift to trustees, coupled with a complete and absolute intention in favour of charity, and only the time and manner of carrying out the intention is left in uncertainty. This would move number 7 from the foregoing subdivision (2) to subdivision (1). In any event, were bequests 7 and 8 or either of them to fail, they would fall into the residue; and, if I am right in my interpretation of the words of 9, be dealt with under that declaration and direction.

For these reasons, I would dismiss any appeals as to bequests numbered herein, 1, 2, 3, 4, 5, and 6, and allow the appeals as to bequests numbered herein 7, 8, and 9—and direct that the funds covered by these last three bequests, which form much the larger part of the estate, should be applied to charitable purposes *cy-près*, under a scheme to be formulated by the trustees, submitted to the Attorney-General, and approved of by the Court, leave being reserved to apply from time to time to a Judge of the High Court Division for directions.

The costs of all parties out of the estate, those of the trustees, the Official Guardian, and the Attorney-General, who should be notified of the settling of the order, to be taxed and paid as between solicitor and client.

Judgment as stated by the Chief Justice.

App. Div.
1917

RE
ORR.

Ferguson, J.A.

1917

Nov. 12.

[APPELLATE DIVISION.]

ONTARIO HUGHES-OWENS LIMITED V. OTTAWA ELECTRIC R.W. CO.

Negligence—Street Railway—Collision of Street-car with Automobile—Negligence of Motorman—Negligence of Chauffeur—Findings of Jury—Evidence—Contributory Negligence—Ultimate Negligence—New Trial.

In an action for damages for injury to the plaintiff's automobile, which was struck by a street-car of the defendant company when the plaintiff's chauffeur was attempting to cross a street in front of the approaching car, it was held, upon the evidence, that the finding of the jury at the trial that the chauffeur was not guilty of any negligence in operating the automobile which caused or contributed to the accident, could not be supported and must be set aside.

And, the attention of the jury not having been directed to the question whether, but for the negligence of the defendant company's motorman, the accident might have been avoided, notwithstanding the negligence of the chauffeur, and their findings in favour of the plaintiff not being conclusive of that question, a new trial was directed.

The negligence spoken of as ultimate negligence may be established either by an act occurring after the effect of the contributory negligence has been spent and the crisis has supervened, or by a condition created negligently prior to the emergency, but still operating so as to prevent any immediate act from being effective.

The practice of leaving to the jury the question whether, if both parties were guilty of negligence, the defendant could have done anything which would have prevented the accident, should be followed in every instance where contributory negligence is alleged, unless the facts clearly exclude any inference of ultimate negligence.

Loach v. British Columbia Electric R.W. Co., [1916] 1 A.C. 719, explained and followed.

APPEAL by the defendant company from the judgment of SUTHERLAND, J., at the trial, upon the findings of a jury, in favour of the plaintiff company, for the recovery of \$754.23 damages and costs, in an action for injury to the plaintiff company's automobile in a collision with a street-car of the defendant company, in a highway, by reason of the negligence of the defendant company's motorman, as the plaintiff company alleged.

The questions left to the jury and their answers were as follows:—

1. Was the defendant company guilty of any negligence which caused or contributed to the accident? A. Yes. Unanimous.

2. If so, wherein did such negligence consist? A. (1) motorman negligent of his duty in not having perceived motor car sooner and then not exercising precaution to avert a possible accident. Unanimous. (2) Street-car was being driven at excessive rate of speed. Unanimous. (3) Motorman was incompetent. Unanimous.

3. Or was the plaintiff's chauffeur guilty of any negligence in operating the motor car which caused or contributed to the accident? A. No. Unanimous.

4. If so, wherein did such negligence consist? (Not answered.)

5. Could the chauffeur, by the exercise of reasonable care, have avoided the accident? A. No. Unanimous.

6. If you answer "yes" to the last question, what could he have done? (Not answered.)

7. Damages (if any)? A. \$754.23. Unanimous.

October 1. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

Taylor McVeity, for the appellant company, argued that there was no sufficient evidence to justify the verdict of the jury. The learned trial Judge had misdirected the jury on the question of the damages, which were excessive; but counsel did not lay much stress on this point. Negligence or contributory negligence on the part of the plaintiff company disentitled it to any damages: *O'Hearn v. Town of Port Arthur* (1902), 4 O.L.R. 209; *Danger v. London Street R. W. Co.* (1899), 30 O.R. 493.

A. E. Fripp, K.C., for the plaintiff company, respondent, argued that the verdict of the jury was right, and supported by the evidence. He referred to *Milligan v. Toronto R.W. Co.* (1908), 17 O.L.R. 530.

McVeity, in reply.

November 12. The judgment of the Court was read by HODGINS, J.A.:—I think the chauffeur convicts himself of negligence, by his own testimony.

He arrived on the scene, operating the car, and when coming out on to Dalhousie street, which runs north and south, he found his view to the south obstructed by a building. He blew his horn and slowed up, because, as he says, "You have to go quite a distance forward before you can see up Dalhousie street." He moved ahead to go across the street, and, when he got out so that he could see up the street, he sighted the car. He was then "going so slow that" (he) "could not get up speed to go across the street to get to the other side in time." This he repeats in cross-examination.

1917

ONTARIO
HUGHES-
OWENS
LIMITED
v.
OTTAWA
ELECTRIC
R. W.
Co.

App. Div.
1917

ONTARIO
HUGHES-
OWENS
LIMITED
v.

OTTAWA
ELECTRIC
R. W.
Co.

Hodgins, J.A.

The learned Judge in his charge to the jury put it to them as if the chauffeur was in a position of danger at the moment and had to act suddenly, and that the very best judgment could not always be expected under such circumstances. I can find no trace in his evidence of such a crisis. He thought he could run northward while the car slowed down, and cross ahead of it. He had it in full view when he made this decision, the front wheels of his car being well out and about three or four feet from the westerly track on Dalhousie street. He says he never had any idea that the street-car would hit him, and so he went "on an angle straight across the street" and "on an angle as soon as ever" (he) "saw the street-car."

Before he got across, he was struck; and, apparently to account for this, he calls the speed of the car terrific and tremendous, overlooking the fact that if it were 25 miles an hour, as he testifies, and the car only 75 feet away when sighted, it would cover that distance and the 17 yards he travelled, in about five seconds.

If his evidence as to speed is correct, he was foolhardy in the extreme in trying to cross. If it is not, and the speed was what others testify, from 7 to 12 miles an hour, then one can understand how, chauffeur-like, he came to chance getting across before the car could touch him. This latter view is more in line with his answer: "I thought I had lots of time to get away from him, and I suppose he thought I would get away from him."

It is unnecessary to decide which of the positions is the correct one. The chauffeur was, on his own shewing, perfectly safe, and the car was under control, and he chose to take a step either utterly foolish or quite unwise and unjustifiable, having regard to the approaching car, whether going at high speed or not.

The finding of the jury acquitting him of negligence cannot be supported. I think this is a case in which the powers given by sec. 27 of the Judicature Act, R.S.O. 1914, ch. 56, may be exercised; and that finding must be set aside.

There, however, remains the question whether the principle underlying the decision in *Loach v. British Columbia Electric R.W. Co.*, [1916] 1 A.C. 719, is applicable to this case. That principle, as I understand it, is, that the negligence spoken of as ultimate negligence may be established either by an act occurring after the effect of the contributory negligence has been spent

and the crisis has supervened, or by a condition created negligently prior to the emergency, but still operating so as to prevent any immediate act from being effective.

Thus in the *Loach* case the defective brake created a condition continuously disabling the motorman from controlling his car in time.

In the present action, the jury have found that the appellant's negligence has two elements—omitting the third ground, incompetence—as to which there is absolutely no evidence. These were excessive speed and neglect in not perceiving the motor car sooner, and then not exercising precaution to avert a possible accident.

These findings mean that the motorman was coming along blindly and also at too high a speed, or that the speed was excessive in view of the absence of look-out, and in one aspect indicate a negligence concurrent with that of the respondent's chauffeur and operating with it so as to cause the collision. They do not precisely indicate whether, after the motorman ought to have seen the chauffeur intending to cross the tracks, he was disabled by his excessive speed from doing anything towards averting the catastrophe, or, if not, what negligent act is intended by the words "not exercising precaution."

The motorman deposed that he looked east and west when he reached York street, a wide street with a boulevard in the middle of it in the eastern section. At that time the motor would have been 40 or 50 feet in front, crossing or having crossed the western track on a course converging on the path of the street-car. The motorman may have accelerated his pace on seeing that nothing was approaching from either side, neglecting to look ahead, as in *Kerr v. Townsend* (1917), 12 O.W.N. 166. He may, on the other hand, have merely kept his rapid pace and been unable, even if he had seen, to check his car on the slight down grade existing at this point: *City of Calgary v. Harnovis* (1913), 48 S.C.R. 494; *Canadian Pacific R.W. Co. v. Hinrich* (1913), *ib.* 557. On the other hand, the contributory negligence of the chauffeur may not have been spent, in the sense of having been completely effective as negligence, until he had turned in on the track of the on-coming car. Consideration of the respective negligent acts, and apportionment of the proper consequences of each in turn, is something the jury should have had their attention

App. Div.
1917

ONTARIO
HUGHES-
OWENS
LIMITED

v.

OTTAWA
ELECTRIC
R. W.
Co.

Hodgins, J.A.

App. Div.
1917

ONTARIO
HUGHES-
OWENS
LIMITED
v.
OTTAWA
ELECTRIC
R. W.
Co.

Hodgins, J.A.

directed to, instead of it being left for an appellate Court to analyse.

Since the *Loach* case, at least, the practice, observed by the learned Judge who tried that action, of leaving the question to the jury, "If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident?" should be followed in every instance where contributory negligence is alleged, unless the facts clearly exclude any inference of ultimate negligence.

The point of time at which ultimate or second negligence may be said to arise is, when the person at fault became aware, or should have become aware, of the danger of the other person. This is so expressed in that part of the judgment of Mr. Justice Anglin in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423, 437, 439, 440, cited by the Privy Council, though that does not necessarily carry with it approval of this specific point, the *Loach* case being one where the danger was actually seen in sufficient time.

In *Smith v. City of Regina* (1917), 34 D.L.R. 238, Mr. Justice Lamont states the law before the *Loach* case as settled, thus: "Where a plaintiff himself has been guilty of negligence which contributed to the accident, he cannot recover unless it is established that, notwithstanding the negligence of the plaintiff, the defendant, after he was or should have been aware of the plaintiff's danger, could have avoided the accident by the exercise of reasonable care."

It may be noted that the opinion of Mr. Justice Lamont in *Smith v. City of Regina* (*ante*), that excessive speed is not in itself such an act or condition of negligence as to form a disability to avoid collision of the same nature as the absence of proper brakes in the *Loach* case, is disapproved in *Critchley v. Canadian Northern R.W. Co.* (1917), 34 D.L.R. 245, and is rejected by the Supreme Court in *Columbia Bitulithic Limited v. British Columbia R.W. Co.* (1917), 55 S.C.R. 1.

The judgment in appeal should be set aside and a new trial should be directed between the parties.

The costs of this appeal should be paid by the respondent, and those of the former trial should be to the successful party in the cause.

New trial directed.

[APPELLATE DIVISION.]

1917

Aug. 1.
Nov. 12.VELTRE V. LONDON AND LANCASHIRE FIRE INSURANCE CO.
LIMITED.

Insurance (Fire)—Notice by Insurer Terminating Policy—Registered Post-letter—Tender of Unearned Portion of Premium by Enclosing Money in Letter—Letter not Received by Assured until after Fire—Statutory Conditions 11, 15—"Therewith."

Under statutory condition 11 (R.S.O. 1914, ch. 183, sec. 194), a fire insurance policy may be terminated by the company by giving to the assured seven days' notice to that effect, and, if on the cash plan, by tendering *therewith* a ratable proportion of the premium paid, for the unexpired term; and by condition 15 any written notice to the assured may be by letter delivered to him or by registered letter addressed to him at his post-office address:—

Held (MEREDITH, C.J.O., dissenting), that a policy issued to the plaintiff by the defendants was not effectually terminated by the defendants by mailing to the plaintiff, in a registered letter addressed to her at her post-office address, a notice cancelling the policy, and by enclosing in the letter a sum said to represent the portion of the premium applicable to the unexpired part of the term. The notice, though the letter was not received by the plaintiff until after a fire had occurred, might be sufficient, but the enclosing of the money was not a proper or sufficient tender, and both notice and tender were required.

Semble, also, applying *Skilling v. Royal Insurance Co.* (1902-3), 4 O.L.R. 123, 6 O.L.R. 401, that the notice could be effective in terminating the policy only if and when it reached the plaintiff.

Judgment of SUTHERLAND, J., reversed.

AN action upon a policy of fire insurance. ✓

May 8. The action was tried by SUTHERLAND, J., without a jury, at St. Catharines.

A. C. Kingstone, for the plaintiff.

R. S. Robertson, for the defendant company.

August 1. SUTHERLAND, J.:—The plaintiff is a married woman, living with her husband, Samuel Savino, in the town of Thorold, in the county of Welland. Both are Italians, and it was testified at the trial that it is a common custom among Italians for a married woman to retain her maiden name, which in her case was "F. Veltre."

The husband was working on the canal, and while he was doing so, he and she both say, she began to carry on a grocery business, which, at the time of the fire to be hereafter referred to, was so carried on in the downstairs portion of the building occupied by them, while they lived in the upstairs portion.

The evidence is that, as they came to have a number of small

Sutherland, J.

1917

VELTRE

v.

LONDON

AND

LANCASHIRE

FIRE

INSURANCE

Co.

LIMITED.

children, it began to be necessary for him to give up his work in part and help her in the store. He is able to speak English somewhat, and imperfectly to read and write Italian. She, on the other hand, cannot speak English and cannot read or write. He says that the English-speaking people call his wife Mrs. Savino, and the Italian people Mrs. or Miss Veltre. He says he took a box (No. 984) in the post-office in the town of Thorold in his own name, and had had it for four years before the fire.

A policy of insurance was issued by the defendant company to the plaintiff in the name of "F. Veltre" on the 17th June, 1916, by which the "merchandise, consisting chiefly of stock of groceries, meats, cigars and tobacco," was insured for \$1,200, and "the store furniture and fixtures, useful and ornamental, including safe, cash-register, signs, awnings, tools, implements, scales, refrigerator, cheese-cutter, shelving, electric fans, clock, table, and stove" for \$300, the premium of \$22.50 being paid to the defendant company by or on behalf of the plaintiff.

On the morning of the 25th December, 1916, a fire occurred, by which, as the plaintiff alleges, all of the said goods, chattels, furniture and fixtures, were totally destroyed.

In this action she makes a claim for \$1,500 under this policy, which she alleges to have been in full force and effect at the time of the said fire.

The defendant company in answer pleads that the policy was subject to the statutory conditions set forth in sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183; that, on the 15th December, 1916, they terminated the insurance under the said policy by giving seven days' notice in writing of such termination, by registered letter addressed at Toronto to the plaintiff at Thorold, being her post-office address, and by tendering therewith the sum of \$11.34, being the ratable proportion of the premium paid for the unexpired term calculated from the termination of the policy; and, by virtue of the conditions numbers 11 and 15 of the said statutory conditions, the policy ceased after the expiration of seven days from the giving of such notice; that the policy was not in force or effect on the 25th December, 1916, and the defendant company is not liable in respect of the loss. The defendant company also pleads that the action was commenced prior to the expiration of sixty days after proofs of loss were furnished

by the plaintiff to the defendant company, in accordance with sec. 89 of the said Insurance Act; and the defendant company pleads the provisions of the said section and of condition No. 22 of the statutory conditions, and says that the plaintiff was not, at the time the action was commenced, entitled to commence such action against the defendant company in respect of loss under the policy.

The plaintiff and her husband had left the town of Thorold for a visit in Toronto on Sunday the 24th December, at about ten o'clock in the forenoon, leaving the house and premises in charge of a caretaker of buildings of which the one occupied by them was one, and leaving him to watch the stove with which their premises was heated and attend to the feeding of their horse.

Some attempt, upon cross-examination of the plaintiff and her husband, was made to shew that the loss was not as great as testified to, but no evidence was put in to the contrary, and there is no plea upon the record definitely questioning the amount of the loss.

I think it therefore may be found as a fact, if it is necessary to make such a finding, that the plaintiff sustained a loss which would entitle her to claim \$1,500 under the policy.

It was proved at the trial that on the 15th December, 1916, the defendant company, over the signature of its manager, sent a letter addressed as follows, "F. Veltre, Esq., 82-84-86 Claremont St., Thorold, Ont.," being the name of the plaintiff as mentioned in the policy, and the building in which the goods were said to be situated being described in the policy as No. 82-84, on the north side of Claremont street, in the said town. The letter is as follows:—

"I beg to hand you enclosed herewith in legal tender the sum of \$11.34, being the unearned premium for balance of the current term of policy No. 10514765 of this company issued to you, dated June 17th, 1916, expiring June 17th, 1917, covering \$1,200 on groceries, meats, cigars and tobacco, and \$300 on store furniture and fixtures, including refrigerator, cheese-cutter, shelving, electric fans, clock, table, and stove, all while contained in the 3-storey brick building, occupied as laundry, grocery store, hall and dwelling, situate as above, which is hereby cancelled, and

Sutherland, J.

1917

VELTRE

v.

LONDON

AND

LANCASHIRE

FIRE

INSURANCE

Co.

LIMITED.

Sutherland, J.

1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.

this company will not be held liable should any loss occur after the 22nd December, 1916.”

The letter contained the enclosure as stated, and was registered. It was not delivered to or received by the plaintiff or her husband up to the time that the fire occurred. The letter apparently reached Thorold, as appears by the stamp on the back of the envelope, on the 16th December.

The husband of the plaintiff told a somewhat confused story as to the registered letter, stating in one place that he asked for a registered letter for his wife at the post-office before the fire, and at another point stating that it was only after Wilson—the agent who had negotiated the insurance, delivered the policy and received the premium—told him that there was a registered letter at the post-office that he went to inquire about it, and was told at first there was no letter for her, and later on was offered a letter, but would not then take it, as it was after the fire and too late.

A man named Tony Calabrese testified that on the 26th December, about 10.30, he was present in the post-office when the plaintiff's husband, who said he was looking for a registered letter, asked for mail, and got none. Savino was also recalled, and testified that it was on the Tuesday morning that he was in the post-office with Calabrese.

For the defence, Winnifred Copeland, an employee in the post-office, testified that she knew Savino, who had a box in which his mail was put; that she did not know the name “Veltre” at all up to the time of the fire, after which Savino came in and asked for a letter; that she had remembered then a letter being produced which had come to the office on the 16th December; that it was entered in the book and put in the cupboard with the other registered letters; that the custom was to put a ticket in the box if there was a registered letter for the owner; and that this was not done with this particular letter. She says it remained there until the 6th January, 1917; that, after the fire, Savino came and asked if there was any registered letter for him; that on the same day he came back with a friend, who asked if there was any registered mail for “Veltre,” to which she replied “Yes,” whereupon Savino would not take it, because, as he said, it was his wife's. She says that she shewed it to him, but he

said he would leave it in the office. He came back next morning to see if it was still there, and, on her saying "Yes," he said he would not take it, as it would be of no use to him. Ultimately the letter was returned to Toronto.

She said that, in the case of a registered letter addressed to any person, if there was no box, the person was supposed to call for his letters. If he came in and inquired, the employees were supposed to tell him the letter was there. She also said that, even if there was a street number, they did not notify the people, and that no effort was made to find out who "F. Veltre" was, or to whom the letter was addressed.

She said she knew there was some blame said to be attached to some one in the office for the delay in delivering the letter—that the postmaster was blamed and the girls under him.

McKague, who had been postmaster for thirteen years, testified and said that he knew Savino had a box in his own name, that he did not know the name "F. Veltre" until after the fire, or of any one asking for mail for her before the fire. He said he had seen the letter in question, but had not known of it until about the time of the fire; that Savino came to him and asked if there was a letter for him, and said there was a letter for him which he had not received, but that he did not mention the name of "Veltre" at all, and that this conversation occurred on the street. He said his instructions were to his employees to try and reach people to whom registered letters were addressed, but that no effort, as far as he knew, was in this case made, as no one knew any one of the name of Veltre, because "they did not come to the wicket."

The amount of \$11.34 enclosed in the letter consisted of Dominion bills, with the exception of 9 cents which was in postage-stamps. It is admitted that the amount tendered is larger than the unearned premium for the balance of the term of the policy properly payable to the plaintiff, but it is contended that what should have been tendered was the exact amount, and the tender of a larger amount was illegal. But "a tender by the debtor of more than is due to his creditor is a good tender of the sum really due." Harris's Law of Tender (1908), p. 76. The principle is, *omne majus continet in se minus*.

Sutherland, J.

1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.

Sutherland, J.

1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.

Included in the statutory conditions printed on the policy is the following:—

“11. The insurance may be terminated by the company by giving seven days’ notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium paid, for the unexpired term, calculated from the termination of the notice, and the policy shall cease after such notice or notice and tender as the case may be, and the expiration of the seven days.”

It is contended on the part of the plaintiff that the notice under this section and the tender accompanying it must be a personal one.

Statutory condition No. 15, however, is as follows:—

“15. Any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him at his last post-office address notified to the company or where no address is notified and the address is not known, addressed to him at the post-office of the agency, if any, from which the application was received.”

It is contended on behalf of the defendant company that this condition applies and governs. I think effect must be given to this view, and that the written notice mailed in Toronto on the 15th December, 1916, was effective.

But it is further contended that, even if such written notice were sufficient to cancel the policy, if a legal tender were also to be made, such tender must be a personal one, even though the notice could be a written one.

I am unable to think that effect can be given to this contention. It seems to me that, if the notice putting an end to the policy, the distinct end aimed at, can be given in writing by registered letter, the tender of the unearned portion of the premium may be made in the same way.

It was argued for the plaintiff that no notice in writing was provided in or permitted under statutory condition 11 under which the company could give notice to terminate the contract; and that, as under statutory condition 12 provision is made for the assured giving written notice, this made it the more clear that nothing but a personal notice was intended under statutory condition 11. It seems to me, however, that, reading statutory conditions 11 and 15 together, the construction to be placed upon

them is this, that the company cannot terminate the policy unless seven days' notice is given to the assured; that, nothing being said about whether this notice shall be given to the assured personally or in writing, it may be given in either way, but, if in writing, it must be by letter delivered to the assured or by registered letter addressed to him at his last post-office address notified to the company, or, where no address is notified and the address is not known, addressed to him at the post-office of the agency, if any, from which the application was received; that the written notice contained in the letter was, therefore, in the present case, a compliance with conditions 11 and 15; and that where in 11 it speaks of "tendering therewith,"—with the notice—that must mean that the tender may accompany the registered letter, if such notice is in that form.

I was referred by counsel for the plaintiff to Laverty's Insurance Law of Canada (1911), p. 80, where is found the following statement by the learned text-writer:—

"In determining when cancellation by the insurer shall be effectual, the principal test is whether the unearned portion of the premium has been paid over to and actually received by the insured;" and certain cases are cited by him in support of his view as follows: *Caldwell v. Stadacona Fire and Life Insurance Co.* (1883), 11 S.C.R. 212; *Armstrong v. Lancashire Insurance Co.* (C.A.) (1903), 2 O.W.R. 599; *Cain v. Lancashire Insurance Co.* (1868), 27 U.C.R. 217, 453.

But the facts are different in those cases to the facts here. It seems to me that, once the defendant company has mailed the registered letter, tendering therewith the unearned premium, after the seven days the legal presumption is, that the notice and money have been received by the assured, and the contract is at an end.

The conclusion being that the contract had been terminated by the defendant company before the fire occurred, the plaintiff cannot succeed, and her action must be dismissed. That she did not receive the notice and money in due course of mailing was not the fault of the defendant company. She did not receive them either because she did not inquire for or send for her mail or because of the failure of the postal authorities to see that she received the letter in question.

Sutherland, J.

1917

VELTRE

v.

LONDON

AND

LANCASHIRE

FIRE

INSURANCE

Co.

LIMITED.

Sutherland, J.

1917

VELTRE

v.

LONDON

AND

LANCASHIRE

FIRE

INSURANCE

CO.

LIMITED.

I do not think, however, it is a case in which I should make any order as to costs.

The plaintiff appealed from the judgment of SUTHERLAND, J.

October 1 and 2. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

A. C. Kingstone, for the appellant, argued that the notice and money were not received by the plaintiff until after the fire occurred, and therefore the defendant company could not succeed in its contention. He also argued that the tender was not sufficient. Under the conditions of the policy, the money must be actually produced in order to make the tender good. Under the Act, the notice, though it need not be written, must be shewn to have been actually received by the assured. The cancellation of a policy by the insured is an arbitrary act, and the provisions under which it can be effected must be strictly observed. A notice under which a policy is terminated is different from an ordinary notice. Reference was made to *Skillings v. Royal Insurance Co.* (1902-3), 4 O.L.R. 123, 6 O.L.R. 401. The tender must be absolutely brought home to the party affected. There is no such thing as a constructive tender, and the presumption of receipt is rebutted here. More money was tendered than was due; and, as the right sought to be enforced is an arbitrary one, there must be strict compliance with the conditions under which it can be exercised. Reference was made to *Joyce on Insurance* (1897), paras. 1669-1671; *May on Insurance*, 4th ed., para. 67 K.; *Halsbury's Laws of England*, vol. 17, pp. 417-419; *Laverty's Insurance Law of Canada* (1911), pp. 79, 80; *British and American Telegraph Co. v. Colson* (1871), L.R. 6 Ex. 108; *In re Imperial Land Co. of Marseilles, Harris' Case* (1872), L.R. 7 Ch. 587, 592; *Metropolitan Life Insurance Co. v. Montreal Coal and Towing Co.* (1904), 35 S.C.R. 266; *Bank of Commerce v. British America Assurance Co.* (1889), 18 O.R. 234.

R. S. Robertson, for the defendant company, respondent, relied on the 15th statutory condition. The *Skillings* case was not applicable. Reference was made to *Re Simmons and Dalton* (1886), 12 O.R. 505; *Bruner v. Moore*, [1904] 1 Ch. 305. The rules governing the acceptance of offers differ from the rules as

to offers, and reference should be had to the ordinary course of business in such matters. The tender must be considered along with the notice, as shewn by the use of the word "therewith" in the condition. As to more money being tendered than was due, it is only when change is asked for, that such a tender is bad. "Tendering" is not used in a technical sense, but simply means, returning the money. Reference was made to *Thairwall v. Great Northern R.W. Co.*, [1910] 2 K.B. 509. [It was further argued that this action was premature if the policy was in force, but this defence was subsequently abandoned, on terms.]

Kingstone, in reply, referred to *Jureidini v. National British and Irish Millers Insurance Co. Limited*, [1915] A.C. 499.

November 12. HODGINS, J.A.:—Appeal from the judgment of Sutherland, J., dismissing the action.

Among the pleas is one setting up that the action is premature under sec. 89 of the Insurance Act, R.S.O. 1914, ch. 183, and condition 22.

This defence was insisted upon before us, but is not dealt with by the learned trial Judge, who decided that the policy had been cancelled before the fire. The respondent company, since the argument has, on terms, abandoned this defence. Attention may perhaps be directed to the case of *Strong v. Crown Fire Insurance Co.* (1912), 3 O.W.N. 481, 1 D.L.R. 111, in which the Court found a way to overcome such a plea, when purely technical.

There remains, therefore, only the point decided by the learned trial Judge. The respondent company pleads that it has validly cancelled the policy under statutory conditions Nos. 11 and 15. This was effected, as the company contends, by mailing to the appellant, in a registered letter, addressed to her under the name "F. Veltre, Esq.," "82-4-6 Claremont St., Thorold, Ont.," a notice cancelling the policy, and by enclosing in this letter the respondent company's cheque for \$11.34, or legal tender to that amount, "being the unearned premium for balance of the current term of policy No. 10514765."

The letter containing the notice and money was never delivered to or received by the appellant until after the fire.

The sole question raised is, whether the method thus adopted

App. Div.
1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.

App. Div.
1917

VELTRE
v.

LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.

Hodgins, J.A.

was an effective compliance with the conditions which require a tender of the unearned premium to be made as well as the giving of notice.

It was held by the learned trial Judge that "if the notice putting an end to the policy, the distinct end aimed at, can be given in writing by registered letter, the tender of the unearned portion of the premium may be made in the same way."

I am, with respect, unable to agree with this conclusion. While it is true that the end aimed at is cancellation, that object is not achieved by a mere notice, but requires also a tender of the unearned premium. The giving of notice by letter does not complete the cancellation. It is only one step or element, the other being in effect the payment of the money. The reason for the return of the premium which has not been earned is two-fold. One is that it would be inequitable, on cancellation, to retain it; the other is that the assured is entitled to have in hand the money wherewith to insure elsewhere. The result of the trial judgment is to enable the respondent company to cancel the policy without the assured being aware of it, and therefore being unable to protect herself by insuring elsewhere. A tender of the money, if personal, leaves the assured in no doubt of the position and free to safeguard herself by seeking another company. It seems unjust to deprive her of all the protection against loss by fire, while leaving her in fact under the belief that she was still insured, unless required to do so by very clear words in the condition endorsed upon the policy.

Under condition 11, there are two things to be done, and done at the same time. One is a seven days' notice, not required to be in writing, and the other is a tender "therewith" of a ratable proportion of the premium paid. The essentials of a valid tender are, actual money, precise amount, and personal offering. Where, as here, the respondent company is required to calculate the amount, which is not known to the assured nor its return expected, it is reasonable that the assured should have the right to insist on all these essentials, unless they are waived. The notice is entirely the act of the insurance company, but the tender must have the assent of the assured if it is to be made otherwise than as by law required. I fail to see in the word "therewith" a wiping out of any safeguard thrown around a

tender for the protection of the person who is, till that moment, entitled to enforce the contract.

The reasonable construction, as it appears to me, of the two conditions is, that, while a notice may be either a verbal or a written notice (and if written it may be given by registered letter), yet a notice of cancellation, if it is intended that the tender shall be made "therewith," must be such a one as enables a tender to be effectually given. It should not be one which eliminates all the safeguards of a legal and proper tender, for no other reason than that of saving the pocket of the insurance company. There is an element of unfairness in applying to the actual return of the money which purchased the insurance a conventional way of giving written notices, often quite unimportant, if the result is to be that cancellation may be effective, although the insured remains totally unaware of it. I do not think the conditions pleaded should be construed in that way if there is an equally reasonable meaning to be found in them which leads to no such inequitable result.

This is sufficient to dispose of the appeal in the appellant's favour. But upon the point that, as to the notice itself, posting alone is sufficient, I think the case of *Skillings v. Royal Insurance Co.*, 4 O.L.R. 123, 6 O.L.R. 401, expresses the proper view to be taken where the act in question is cancellation by post-letter, and that it does not wholly turn on the improper address. The consideration pointed out by Lount, J., and by Garrow, J.A., limits, in my humble judgment, the application of the cases cited by my Lord the Chief Justice (*infra*) where what is to be accomplished by a notice is cancellation of an existing contract, and where that notice is unexpected by the other party, and till received is still subject to recall, it can be effective in terminating the obligation only if and when it reaches that other party.

Pursuant to the terms agreed upon between the parties in consideration of the abandonment of the other plea, the judgment will be set aside and judgment will be entered for the appellant for the money secured by the policy, without costs of action or appeal.

MACLAREN and FERGUSON, JJ.A., agreed in the result.

MAGEE, J.A.:—It seems to me that the Legislature, in giving power to an insurance company to put an end to its contract

App. Div.
1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.
Hodgins, J.A.

App. Div.
1917
VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.
Magee, J.A.

upon which an insured person was relying for protection against loss, could not have intended that, in returning the money which it had not earned and was refusing to earn, the company should be at liberty to deposit legal tender money in a letter in the post-office, and that from the moment of its deposit the money would be at the risk of the person to whom it was addressed—who would have no other information of its being sent or of the intention to send it. And yet how otherwise could the company “tender” back the money than by legal tender money? It could not send a cheque or a bank draft, for that would not be a tender. In choosing between inconvenience to the company which is cancelling its contract and the risk of actual loss to its contractee, the interpretation should be adopted, if possible, which favours the latter, who is not in fault and is not disturbing the *status quo*. I think the language of the Legislature does not prevent this interpretation.

MEREDITH, C.J.O. (dissenting):—This is an appeal by the plaintiff from the judgment, dated the 1st August, 1917, which was directed to be entered by Sutherland, J., after the trial of the action before him sitting without a jury at St. Catharines on the previous 8th day of May.

The action is on a fire insurance policy issued by the respondent to the appellant, and two defences were set up: (1) that the policy had been cancelled before the happening of the loss; and (2) that the action was begun before the expiration of sixty days from the furnishing of the proofs of loss, and therefore prematurely.

The learned trial Judge gave effect to the first of these defences; and, by arrangement between the parties, the second has been abandoned.

The policy was on the cash plan, and the respondent, having determined to avail itself of its right under statutory condition 11 to cancel it, on the 15th day of December, 1915, sent by registered letter, properly addressed to the appellant, notice of cancellation, and enclosed in the letter the proportion of the premium which, by the provisions of that condition, the respondent was required to tender to the appellant. The letter, owing to the absence from home of the appellant, was not received by her

until after the 25th December, 1915, which was the day on which the loss in respect of which the action is brought occurred.

It was contended on behalf of the appellant that what was thus done did not effect a cancellation of the policy; that the sending of the unearned premium in the letter notifying the appellant of the cancellation was not a tender of it within the meaning of condition 11; and that in any case neither the notice of cancellation nor the tender was effective until seven days had elapsed from the time of the receipt of the letter by the appellant, and *Skillings v. Royal Insurance Co.*, 4 O.L.R. 123, 6 O.L.R. 401, was relied upon as a conclusive authority in favour of the appellant as to the latter point.

In that case the insured had intended to give notice of their desire to surrender their policy by sending the notice to the agent of the company at Barrie, but by mistake their letter giving the notice was addressed to him at Parry Sound, instead of, as it should have been, at Barrie, and the notice did not reach the agent until after the loss had happened.

The company contended that what had been done had terminated the policy, but it was held that it had not.

The condition corresponding to condition 15 was then condition 23, and it provided that:—

“Any written notice to a company for any purpose of the statutory conditions, where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post-letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorised agent of the company.”

As this condition had not been complied with, there was nothing providing for any mode of giving the notice, and the general law applied, and what was decided was, that according to it the notice was not effectively given until it was received by the company, or by some one having authority to receive it for the company.

In order to succeed in its defence in the case at bar, the respondent must prove compliance with the provisions of condition 11; and therefore (1) that the prescribed notice was given at least seven days before the loss happened; (2) that simultan-

App. Div.
1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
CO.
LIMITED.

Meredith, C.J.O.

App. Div.
1917
VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.
Meredith, C.J.O.

ously with the giving of the notice the tender which the company was required to make was made.

It was contended by counsel for the appellant that no tender within the meaning of condition 11 was ever made; that, although condition 15 permits the notice to be sent by registered letter, it does not authorise the making of the tender in that way; and that in any case neither notice nor tender was given or made until the respondent's letter reached the hands of the appellant.

In my opinion, these contentions are not well-founded. Condition 11 requires that the giving of the notice and the making of the tender shall be concurrent acts, for that I take to be the effect of the words, "by giving seven days' notice to that effect, and, if on the cash plan, by tendering therewith . . ."

Then, when the contract provides, as does condition 15, that "any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him . . .," it must follow that the tender may be made by sending the money in the registered letter, or that, where the insurance is on the cash plan, the insurer cannot avail himself of the means authorised by condition 15 to terminate the contract, for the tender, if it cannot be made as the respondent made it, must be a personal one, and in making it the assured must comply with all the requirements of the law as to tender.

There can, I think, be no doubt that, if a verbal or written notice, such as condition 11 provides for, were given, and at the same time the proportion of the premium which the insurer is required to return were paid to the assured, that would satisfy the requirements of the condition; and it follows, I think, if that be the case, that the payment of it by sending it with the registered letter would also satisfy those requirements.

If the notice in writing must be accompanied by the tender, as in my opinion it must be, condition 11 was complied with, if the posting of the registered letter containing the notice and the money has the same effect as the delivery of them to the insured would have had; that is, if the notice was given and the tender was, within the meaning of condition 11, made when the registered letter was posted.

The answer to this question depends upon the meaning which is to be given to the opening words of condition 15: "Any

written notice to the assured may be by letter delivered to the assured or by registered letter addressed . . .”

The general rule, no doubt, is, that, where a person communicates through the post-office, the communication is not made to the person to whom it is sent unless or until it is received by him.

There are exceptions to this rule. One of these is where the communication is notice of the dishonour of a bill or promissory note; another is where the communication is a notice to quit: *Papillon v. Brunton* (1860), 5 H. & N. 518, 521; and these notices, when sent by post, are effective from the time of mailing them; and a third exception is where the contract provides for that mode of communication, and in that case also where a letter making it, properly addressed, is posted, it is made when the letter is deposited in the post-office: *Dunlop v. Higgins* (1848), 1 H.L.C. 381; *Household Fire Insurance Co. v. Grant* (1879), 4 Ex.D. 216; *Henthorn v. Fraser*, [1892] 2 Ch. 27; *In re Imperial Land Co. of Marseilles, Harris' Case*, L.R. 7 Ch. 587.

The case at bar falls within the third of these exceptions, inasmuch as by the contract of the parties it is provided that communications for the giving of which condition 11 provides may be sent through the post-office, and therefore the posting of the letter is the equivalent of the delivery of it to the person to whom it is sent, and what took place had; in my opinion, the effect of cancelling the policy on the expiration of seven days from the day on which the letter was deposited in the post-office. But, even if the notice is effective only from the time when in the ordinary course the letter would reach the person to whom it was sent, the notice given to the appellant was a sufficient notice.

The *Skillings* case (*supra*) is not inconsistent with this view, for in that case, as I have pointed out, the mode of sending the notice for which the policy provided had not been followed, and there was therefore nothing to take the case out of the general rule as to communication by post to which I have referred.

I admit the force of the argument that it is only the letter giving the notice that the contract provides may be given by means of the post-office, and that there is nothing provided as to the mode of making the tender, and therefore that it must be made in a way that meets all the requirements of the law, and

App. Div.
1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.

Meredith, C.J.O.

App. Div.
1917

VELTRE
v.
LONDON
AND
LANCASHIRE
FIRE
INSURANCE
Co.
LIMITED.

Meredith, C.J.O.

therefore personally. The view of the learned trial Judge was in accordance with my own view as to the effect of conditions 11 and 15; but, if I were in doubt as to which of the opposing views is to be preferred, I would not be justified in joining in a judgment overruling him, for to doubt is to affirm.

I would, for these reasons, affirm the judgment and dismiss the appeal with costs.

Appeal allowed; MEREDITH, C.J.O., dissenting.

END OF VOLUME XL.

APPENDIX I.

SUPREME COURT OF ONTARIO.

On the 1st of October, 1917, Rule 773 (e) was passed, amending several Rules as follows:—

(1) Rule 544 is amended so as to read as follows:—

544.—(1) Where a judgment directs the recovery of specific goods, chattels, deeds, securities, documents, or any property other than land or money, a writ of delivery may issue directing the sheriff to cause such goods or property to be delivered up in accordance with the judgment.

(2) If the goods and property are not delivered up by the judgment debtor and cannot be found and taken by the sheriff, the judgment creditor may apply for an order directing the sheriff to take goods and chattels of the judgment debtor to double the value of the property in question to be kept until the further order of the Court to enforce obedience to the judgment.

(3) By leave of the Court such judgment may also be enforced by attachment, committal, or sequestration.

(2) Form 118 is amended so as to read as follows:—

No. 118.

Writ of Delivery.

We command you that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment*] to be returned to A.B., which chattels the said A.B. by a judgment in this action dated , recovered against C.D. [or C.D. was ordered to deliver to the said A.B.].

(3) Rule 722 (3) is amended by inserting “5 per cent.” in lieu of “4½ per cent.”

(4) Rule 268 is amended by adding clauses (2) and (3) as follows:—

(2) The Court may fix the remuneration of any such person and may direct payment thereof by any of the parties.

(3) Unless all parties are *sui juris* and consent, the powers conferred by this Rule shall only be exercised by or by leave of a Judge.

(5) Rule 735 is amended by adding clauses (2) and (3) as follows:—

(2) All money paid into a Surrogate or County Court and unclaimed for two years shall be transmitted by the registrar or clerk to the Accountant together with a statement shewing when the money was paid in and a certified copy of all judgments or orders affecting the same.

(3) Such money shall be paid out to any person found entitled thereto upon the production of a judgment or order of the Surrogate or County Court Judge and shall in the meantime be dealt with as other money in the Supreme Court.

This Rule is to come into effect forthwith.

Rule passed 7th December, 1917.

Rule 773 (f) as follows:—

Rule 492 is amended by adding clause 6 as follows:—

(6) Notwithstanding the provisions of Rule 176, the time limited by this Rule may, either before or after its expiry, be extended only by a Judge of the Appellate Division. An application to extend time may be referred to a Divisional Court.

This Rule is to come into effect forthwith.

APPENDIX II.

Ontario cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of vol. 39 of the Ontario Law Reports:—

BROWN (J. F.) CO. LIMITED AND CITY OF TORONTO, RE, 36 O.L.R. 189, affirmed by the Supreme Court of Canada: CITY OF TORONTO v. J. F. BROWN Co., 55 S.C.R. 153.

COCKBURN v. TRUSTS AND GUARANTEE CO., 38 O.L.R. 396, affirmed by the Supreme Court of Canada: COCKBURN v. TRUSTS AND GUARANTEE CO., 55 S.C.R. 264.

CRANE v. HOFFMAN, 35 O.L.R. 412, affirmed by the Supreme Court of Canada: CRAIN v. HOFFMAN, 55 S.C.R. 219.

MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK, 37 O.L.R. 335, affirmed by the Judicial Committee of the Privy Council: FIDELITY AND CASUALTY CO. OF NEW YORK v. MITCHELL, [1917] A.C. 592.

REX v. TORONTO R.W. Co., 34 O.L.R. 589, reversed by the Judicial Committee of the Privy Council: TORONTO R.W. Co. v. THE KING, [1917] A.C. 630.

WADE v. CRANE, 35 O.L.R. 402, affirmed by the Supreme Court of Canada: CRAIN v. WADE, 55 S.C.R. 208.

INDEX.

ACCOUNT.

See CONTRACT, 1—ASSIGNMENTS AND PREFERENCES—ATTACHMENT OF DEBTS, 1—BANKS AND BANKING—VEXATIOUS PROCEEDINGS.

ADDRESS OF COUNSEL.

See TRIAL.

ADMISSIONS.

See HUSBAND AND WIFE.

ADULTERY.

See CRIMINAL LAW, 1.

ADVANCES.

See BANKS AND BANKING—CONTRACT, 1.

ADVERSE POSSESSION.

See TRUSTS AND TRUSTEES, 1.

ADVERTISEMENT.

See MORTGAGE, 2—SHERIFF.

AFFIDAVITS.

See BASTARD—ONTARIO TEMPERANCE ACT, 3.

AGENT.

See CONTRACT, 1—INSURANCE, 3.

AGREEMENT.

See CONTRACT.

ALIEN ENEMY.

Subject of Enemy Power Residing in Neutral Country—Trading with the "Enemy"—Contract for Sale of Land in Ontario—Validity of Contract—Disposition of Purchase-money—Intention to Transmit to Enemy Country—

ALIEN ENEMY—(Continued).

*"Assisting" the Enemy—Criminal Code, sec. 74 (i)—Specific Performance of Contract at Suit of Purchaser—Costs—Direction to Pay Money into Court to Credit of Alien Vendor—Retention until after War—Consolidated Orders respecting Trading with the Enemy.]—Upon the declaration of war it became unlawful for any resident of Canada to trade with the enemy; but, with reference to civil rights, "enemy" does not mean a person who is a subject of a nation with which His Majesty is at war, but a person, of whatever nationality, who resides or carries on business in enemy territory. — *Janson v. Driefontein Consolidated Mines Limited*, [1902] A.C. 484, *Porter v. Freudenberg*, [1915] 1 K.B. 857, and *Daimler Co. Limited v. Continental Tyre and Rubber Co. (Great Britain) Limited*, [1916] A.C. 307, followed.—The defendant, by birth a Hungarian, resident in the United States, and retaining his Austro-Hungarian nationality, was the owner of real property in Ontario, which, in December, 1916, he agreed to sell to the plaintiff. The defendant admitted that, if paid the purchase-money, he intended to send part of it to his wife in Hungary for the support of herself and family:—*Held*, that the agreement was not, by reason of the defendant being an alien enemy subject, invalid—he being a resident, at the time of the agreement, of a neutral country*

ALIEN ENEMY—(Continued).

—and the plaintiff was entitled to specific performance of the agreement.—But it was the duty of the Court to prevent the defendant from “assisting” the enemy (Criminal Code, sec. 74 (*i*)), by impounding the purchase-money and retaining it in Court to the credit of the defendant until after the war or until further order.—A judgment for specific performance was pronounced with costs; the purchase-money, after deduction of the plaintiff’s costs, to be paid into Court.—The remedies under secs. 3 (3), 17, and 19 of the Privy Council’s Consolidated Orders respecting Trading with the Enemy, considered. *Lampel v. Berger*, 165.

See TRIAL.

AMENDMENT.

See MUNICIPAL CORPORATIONS
—ONTARIO TEMPERANCE ACT, 3.

APARTMENT HOUSE.

See ONTARIO TEMPERANCE
ACT, 4.

APPEAL.

1. *To Appellate Division of Supreme Court of Ontario — Motion to Extend Time for Appealing from Order of Judge of High Court Division in Chambers — Forum — Division Courts — Jurisdiction — Trespass to Land — Duty of Judge — Trial of Action — Transfer to Higher Court where Title to Land in Question — Division Courts Act, sec. 69.*—The ruling of MIDDLETON, J., in *Re Harmston v. Woods* (1917), 39 O.L.R. 105, that a Division

APPEAL—(Continued).

Court had no jurisdiction (sec. 62 (1) (*a*) of the Division Courts Act) in an action for trespass to land, having been overruled by an appellate Court, in *McConnell v. McGee* (1917), 39 O.L.R. 460, the plaintiff in the former case applied to the Appellate Division to extend the time for appealing from the order of MIDDLETON, J.—the time allowed having expired before the decision in the latter case; and it was *held*, that the application was unnecessary, at all events until after the Judge in the Division Court had been asked and had refused to try the case; and that, if it became necessary to move again, the application should be to the High Court Division. (But see now Rule 773 (*f*)).—The Judge in the Division Court should, upon having his attention called to the fact that that Court had jurisdiction, try the action if no right or title to land came in question in it; and, if it did, he should transfer the action to the Supreme Court of Ontario, under sec. 69 of the Division Courts Act. *Re Harmston v. Woods*, 171.

2. *To Supreme Court of Canada — Effect of Giving Security — Supreme Court Act, sec. 76 — Stay of Execution of Judgment — Injunction Remaining in Force — Application for Stay of Injunction pending Appeal — Judgment Entered on Direction of Appellate Division — Judgment of High Court Division — Power of Judge of High Court Division — Judicature Act, sec. 43 — Exercise of Power — Cir-*

APPEAL—(*Continued*).

cumstances of Case.]—By the order of a Divisional Court of the Appellate Division, the judgment of the trial Judge, dismissing the action, was set aside, and judgment was directed to be entered for the plaintiffs for damages and an injunction restraining certain of the defendants from entering upon a lane. These defendants had appealed from the order of the Divisional Court to the Supreme Court of Canada, and security for the costs of the appeal had been given:—*Held*, that, while, by sec. 76 of the Supreme Court Act, R.S.C. 1906, ch. 139, the execution of the judgment was stayed the injunction remained in force.—*McLaren v. Caldwell* (1882), 29 Gr. 438, followed.—*Bland v. Brown* (1916), 37 O.L.R. 534, distinguished.—*Held*, also, that, although the injunction was contained in a judgment which the Divisional Court directed to be entered, the judgment was the judgment of the High Court Division; and a Judge of that Division, exercising the power of the Court pursuant to sec. 43 of the Judicature Act, had power to stay the operation of it.—*Mitchell v. Fidelity and Casualty Co. of New York* (1917), 38 O.L.R. 543, and other cases, referred to. And, having regard to the circumstances, the power should be exercised. *Baldwin v. O'Brien*, 287.

See ASSESSMENT AND TAXES, 1
—BANKS AND BANKING—CONTRACT, 3—CRIMINAL LAW, 2—
DITCHES AND WATERCOURSES

APPEAL—(*Continued*).

ACT, 2—GIFT—INTEREST, 1, 2
—LIMITATION OF ACTIONS—ONTARIO TEMPERANCE ACT, 6—
RAILWAY, 2—STREET RAILWAY, 1.

APPELLATE DIVISION.

See APPEAL, 1.

APPEARANCE.

See WRIT OF SUMMONS.

APPORTIONMENT.

See ATTACHMENT OF DEBTS, 2.

ARBITRATION AND AWARD.

See DITCHES AND WATERCOURSES ACT—EASEMENT—
MUNICIPAL CORPORATIONS—
RAILWAY, 2.

ARREST.

See CRIMINAL LAW, 2.

ASSESSMENT AND TAXES.

1. *Appeal from Order of Ontario Railway and Municipal Board—Question of Fact—Assessment Act, R.S.O. 1914, ch. 195, sec. 80 (6) — Business Assessment — “Business of a Distiller” — Sec. 10 (1) (a) of Act.*]—By sec. 10 (1) (a) of the Assessment Act, “every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called ‘Business Assessment’ . . . (a) Every person carrying on the business of a distiller for a sum equal to 150 per cent. of the assessed value:”—*Held*, that the Court could not judicially know what “the business of a distiller” was; and the contention of a distilling

ASST. & TAXES—(Continued).

company before the Ontario Railway and Municipal Board, that only that part of the company's premises in which the process of distillation took place was to be taken into account in ascertaining the amount for which the company was assessable, raised a question of fact only for the Board; and, under sec. 80 (6), no appeal lay from the Board's decision.—*Semble*, where it is shewn that a distiller, in addition to distilling, warehouses the product of distillation and also blends liquors from the process of distillation and warehouses these liquors, the words "the business of a distiller" may embrace all these branches of the business.—Remarks on the construction of taxing Acts.—*Attorney-General v. Salt Union Limited* (1917), 33 Times L.R. 365, [1917] 2 K.B. 488, referred to. *Re Hiram Walker & Sons Limited and Town of Walkerville*, 154.

2. *Business Tax—Bank Ceasing to Do Business in Municipality—Taxes Based on Assessment of Previous Year—Assessment Act, sec. 95 (3) (7 Geo. V. ch. 45, sec. 9) —"Removal from Municipality of Person Assessed"—"Person"—Interpretation Act, sec. 29 (x)—Assessment Act, secs. 10, 56, 70, 95—Court of Revision—Power to Remit Taxes—Assessment Act, sec. 118 (1) (7 Geo. V. ch. 45, sec. 11)]*.—In an action to recover from the defendant bank the amount of a tax known as "business tax" for the year 1917, levied by a by-law of the plaintiff city corporation passed on

ASST. & TAXES—(Continued).

the 30th April, 1917, on the basis of an assessment made in 1916, it appeared that the defendant bank, on or before the 31st December, 1916, transferred its assets in the city to another bank, and had not done business in the city during 1917:—*Held*, having regard to the provisions of secs. 10, 56, 70, and 95 of the Assessment Act, R.S.O. 1914, ch. 195, that the defendant bank was a "person" (Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (x)) who had removed from the municipality, and so came within the provisions of sub-sec. (3) of sec. 95 of the Assessment Act, added by 7 Geo. V. ch. 45, sec. 9, passed on the 12th April, 1917.—The power of the Court of Revision to remit the tax or any part thereof, under the provisions of sec. 118 (1) of the Assessment Act, as enacted by 7 Geo. V. ch. 45, sec. 11, was not affected by the decision. *City of Toronto v. Quebec Bank*, 544.

3. *Taxation by Municipality of "Salary" of Judge—"Income"—Powers of Provincial Legislature—Exemptions — Assessment Act, 4 Edw. VII. ch. 23, secs. 2 (8), 3, 5 (14); R.S.O. 1914, ch. 195, secs. 2 (e), 5 (15)—Omission of Word "Imperial"—"Office" of Judge.]*—The defendant, one of the Judges of a County Court, was *held*, not to be exempt from municipal taxation under Provincial legislation in respect of his salary or income as such Judge.—*Abbott v. City of St. John* (1908), 40 S.C.R. 597, followed.—The law as declared by the

ASST. & TAXES—*(Continued).*

Supreme Court of Canada is the law in Canada until otherwise determined by higher authority.—The defendant was assessed for income under the Assessment Act of 1904, 4 Edw. VII. ch. 23, and the action was to recover the taxes for the years 1912 and 1914:—*Held*, that the defendant was not, under the provisions of that Act, exempt from taxation in respect of his income aforesaid. Sections 2 (8) and 5 (14) considered.—*Semble*, if the Assessment Act, R.S.O. 1914, ch. 195, were applicable, the dropping in that Act, sec. 5, clause 15, of the word "Imperial," as used in sec. 5 (14) of the Act of 1904, in exempting "any . . . salary . . . derived by any person from His Majesty's Imperial Treasury," had no significance.—And *held*, that in sec. 2 (8) of the Act of 1904 (sec. 2 (e) of the Act R.S.O. 1914, ch. 195), the words "from a trade or commercial or financial or other business or calling" do not qualify the word "salary" as used in that clause, but only the word "profits," which immediately precedes the words quoted. *City of Toronto v. Morson*, 227.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See ASSIGNMENTS AND PREFERENCES, 1, 2—CONSTITUTIONAL LAW 1,—LANDLORD AND TENANT, 1.

ASSIGNMENT OF RENT.

See ATTACHMENT OF DEBTS, 2.

ASSIGNMENTS AND PREFERENCES.

1. *Assignment for Benefit of Creditors—Agreement of three Principal Creditors with Debtors that all Creditors be Paid pro Rata—Consideration—Mortgage Made to one of three—Assignments and Preferences Act, R.S.O. 1914, ch. 134—Action by Assignee to Make Mortgage Available for all Creditors—Addition of Creditor as Plaintiff Swing on Behalf of all—Equalising of Payments as of Date of Agreement—Distribution of Assets—Accounting.*—In an action by the assignee for the benefit of creditors of a mercantile firm, under an assignment made in January, 1916, pursuant to the Assignments and Preferences Act, to set aside as fraudulent and void a mortgage made by the firm in February, 1915, to the defendant company, a creditor:—*Held*, that the finding of fact of the trial Judge could not be disturbed; and (FERGUSON, J.A., dissenting) that, upon a creditor being added as a party plaintiff and an amendment being made so as to claim relief on behalf of all creditors, the assignee-plaintiff should be declared to hold the mortgage in the first place to equalise the claims of creditors as they existed on the date of a certain arrangement made between the firm and its principal creditors, excluding from the benefit of the security those who had received more than their proper proportions unless they agreed to refund, and excepting the small creditors who might have been paid in full, taking

ASSIGN. & PREF.—(Cont.)

into account the payments made, but excluding from consideration goods supplied to the firm after that date and payments specifically applied thereon, and then for the general benefit of all creditors who should file claims with the assignee. *Mortimer v. Fesserton Timber Co. Limited*, 86.

2. *Assignment for Benefit of Creditors under Assignments and Preferences Act—Creditor Holding Mortgage as Security—Valuation of, at Amount of Claim—Release of Equity of Redemption—Effect upon Right of Creditor against Surety for Part of Claim—Right to Credit in Account—Guaranty—Satisfaction — Discharge.*] — A creditor holding security from a surety cannot, by any dealing to which the surety is not a party, change or prejudice the position of the surety without discharging him; but, when a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security. All the surety is then entitled to is a credit upon the account of the true value of the security improperly released. — *Taylor v. New South Wales Bank* (1886), 11 App. Cas. 596, followed. — *Held*, in this case, that the defendant, the surety, was not discharged: there was no damnification. — The assignee's relinquishment of the right to redeem did not interfere with the right of the creditor to sue the mortgagor, nor *à fortiori* did it deprive the creditor of its rights

ASSIGN. & PREF.—(Cont.)

against the surety. — *Bell v. Ross* (1885), 10 A.R. 458, distinguished. *Rainbow v. Juggins* (1880), 5 Q.B.D. 422, followed. — Differences between the Ontario Assignments and Preferences Act, the repealed Insolvent Act of Canada (upon which *Bell v. Ross* was decided), and the English Bankruptcy Act, 1883, pointed out. — And *held*, that the defendant had not been discharged from her liability as surety for the indebtedness of the company, by reason of any payment or satisfaction of such indebtedness. *Union Bank of Canada v. Makepeace*, 368.

See ATTACHMENT OF DEBTS, 1, 2—COMPANY — CONSTITUTIONAL LAW, 1—LANDLORD AND TENANT, 1.

ASYLUM.

See INSURANCE, 4.

ATTACHMENT.

See CONTEMPT OF COURT.

ATTACHMENT OF DEBTS.

1. *Moneys Payable to Judgment Debtor by Railway Company — Assignment to Bank — Security for Indebtedness of Judgment Debtor (Customer) to Bank — Attaching Order Served upon Railway Company and Bank — Validity of Assignment — Absence of Fraud and Insolvency — State of Accounts between Bank and Customer at Time of Service — Rule 590 — No Sum Due to Customer — Possible Subsequent Indebtedness — Apparent Surplus — Unascertained Amount — Property in Debt Attached — Execution in*

ATTACH. OF DEBTS.—(Cont.)

*Hands of Sheriff Binding Goods of Judgment Debtor—Knowledge of Bank—Execution Act, secs. 10, 20.]—H., a customer of a bank, had contracts with a railway company, by which he was to cut and deliver to the company, by the 15th May, 1916, certain piling, for which he was to be paid a specified price per foot. On the 19th July, 1916, he assigned to the bank, as security for all his existing or future indebtedness to the bank, all the moneys due or that might become due to him from the railway company under the contracts. The plaintiffs, who had a judgment against H. and execution in the sheriff's hands, obtained, on the 14th December, 1916, an order attaching all debts owing or accruing due from the railway company and the bank to H., and served the order on both garnishees:—*Held* (MEREDITH, C.J.C.P., dissenting), that an application for payment to the judgment creditors of an unascertained sum said to be due by the bank to H. was properly dismissed. — *Boyd v. Haynes* (1869), 5 P.R. 15, *Gilroy v. Conn* (1912), 3 O.W.N.732, *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499, and *Hollinshead v. Hazelton*, [1916] 1 A.C. 428, referred to. *Rat Portage Lumber Co. v. Harty*, 322.*

2. *Rent of Land—Service of Attaching Order before Gale-day—Effect of Previous Attaching Order—Effect of Writ of Fi. Fa. Lands—Accrual of Rent de Die in Diem—Apportionment Act, R.S.O.*

ATTACH. OF DEBTS.—(Cont.)

1914, ch. 156, sec. 4—*Pro Ratâ Part of Rent—Assignment of Rent by Debtor—Validity—Evidence.]—The defendants—having a judgment for the payment of money against R. and another—in May, 1914, placed a *fi. fa.* lands in the hands of the sheriff. R. was the owner of land which, in April, 1914, he leased to S. for three years, at a rent of \$400 per annum, payable on the 1st November, 1914, 1915, and 1916. In September, 1915, the defendants obtained an attaching order and served it upon S., who, under an order in Chambers, paid into Court the rent due on the 1st November, 1915, which was ultimately paid out to the defendants. In January, 1916, R. assigned to the plaintiff the rent due under the lease, and the plaintiff gave notice of the assignment to S. In September, 1916, the defendants obtained and served upon S. a new attaching order; the plaintiff contested the defendants' claim to the rent due on the 1st November, 1916:—*Held*, that the first attaching order had no effect on the contest between the plaintiff and the defendants.—(2) That the rent was free from the operation of the *fi. fa.* lands.—(3) That the contention of the defendants that the assignment to the plaintiff was invalid, because fraudulent or preferential, failed for want of proof.—*Per RIDDELL, J.*:—The attaching order of September, 1916, did not attach the rent due upon the 1st November, 1916, nor even a *pro ratâ* part thereof, under the Ap-*

ATTACH. OF DEBTS.—(Cont.)

portionment Act, R.S.O. 1914, ch. 156, sec. 4.—*Barnett v. Eastman* (1898), 67 L.J.N.S.Q.B. 517, followed, in preference to *Massie v. Toronto Printing Co.* (1887), 12 P.R. 12, and other Ontario cases. *Holliday v. Bank of Hamilton*, 203.

ATTORNEY-GENERAL.

See CONSTITUTIONAL LAW, 2.

AUTOMOBILE.

See MOTOR VEHICLES ACT—
NEGLIGENCE, 3—ONTARIO TEMPERANCE ACT, 2.

AWARD.

See DITCHES AND WATERCOURSES ACT—EASEMENT—
MUNICIPAL CORPORATIONS—
RAILWAY, 2.

BANKRUPTCY AND INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES—ATTACHMENT OF DEBTS—
BANKS AND BANKING—COMPANY.

BANKS AND BANKING.

Securities Taken by Bank from Customer—*Manufacturing Company*—*Insolvency*—*Winding-up*—*Action by Liquidator and Creditor to Set aside Securities*—*Promissory Notes*—*Negotiation*—*Bank Act, 3 & 4 Geo. V. ch. 9, secs. 88, 90*—*Advances by Bank*—*Two Accounts Kept*—*Overdraft*—*Consolidation of Accounts*—*Written Agreement to Give Securities*—*Advances not Made at Time of Agreement*—*Substituted Goods*—*Title of Bank*—*Mortgages of Real Estate*—*Validity*—*Finding of*

BANKS & BKG.—(Continued).

Trial Judge—*Appeal*—*Mortgage of Land in another Province*—*Jurisdiction.*]—The judgment of SUTHERLAND, J., 37 O.L.R. 591, was affirmed.—*Held*, that the demand-notes of the customer (a wholesale manufacturer, the company in liquidation) had been “negotiated” by the defendant bank, within the meaning of sec. 90 of the Bank Act, 3 & 4 Geo. V. ch. 9.—*Bank of Hamilton v. Halstead* (1897), 28 S.C.R. 235, distinguished.—If a customer has accounts at two or more branches, the bank may consolidate them, and *à fortiori* where the two accounts are in the same branch.—In order to validate a security under clause (b) of sec. 90, it is not necessary that the advance should be made at the time the written promise or agreement is given.—*Imperial Paper Mills of Canada Limited v. Quebec Bank* (1913), 83 L.J.P.C. 67, 110 L.T.R. 91, followed. *Clarkson v. Dominion Bank*, 245.

See ASSESSMENT AND TAXES, 2—
ATTACHMENT OF DEBTS, 1—
HUSBAND AND WIFE—
VEXATIOUS PROCEEDINGS.

BASTARD.

Maintenance—*Form of Affidavit of Affiliation*—“*Really*”—*Illegitimate Children's Act, sec. 3.*]—An action brought by the mother of an illegitimate child against the reputed father for necessities supplied to the child was held to have been properly dismissed on the ground that the affidavit of paternity filed by the plaintiff did not comply with

BASTARD—(Continued).

sec. 3 of the Illegitimate Children's Act, R.S.O. 1914, ch. 154, in that it did not declare that the defendant was "really" the father, but merely that he was the father, of the child. *Jackson v. Kassel* (1867), 26 U.C.R. 341, approved. *Broderick v. McKay*, 363.

BENEFICIARY.

See INSURANCE, 4.

BEQUESTS.

See WILL, 2.

BEVERAGE.

See ONTARIO TEMPERANCE ACT, 1, 6.

BILLS AND NOTES.

See BANKS AND BANKING, 2—INTEREST, 2—PROMISSORY NOTE.

BOARD OF HEALTH.

See NEGLIGENCE, 1.

BREACH OF PROMISE OF MARRIAGE.

See TRIAL.

BROKERS.

See CONTRACT, 1.

BUILDINGS.

See FIXTURES — LANDLORD AND TENANT, 3.

BUSINESS ASSESSMENT.

See ASSESSMENT AND TAXES, 1, 2.

BY-LAW.

See MUNICIPAL CORPORATIONS.

CALLS.

See WRIT OF SUMMONS.

CARETAKER.

See TRUSTS AND TRUSTEES, 1.

CARRIERS.

See RAILWAY, 1.

CASES.

Abbott v. City of St. John (1908), 40 S.C.R. 597, [followed.] — See ASSESSMENT AND TAXES, 3.

Allen, In re, [1905] 2 Ch. 400, 21 Times L. R. 662, followed.] — See WILL, 2.

Attorney-General v. London and North Western R.W. Co., [1892] 3 Ch. 274, 277, followed.] — See PLEADING.

Attorney-General v. Salt Union Limited (1917), 33 Times L.R. 365, [1917] 2 K.B. 488, referred to.] — See ASSESSMENT AND TAXES, 1.

Ayr Harbour Trustees v. Oswald (1883), 8 App. Cas. 623, followed.] — See EASEMENT.

Baeder and Canadian Order of Chosen Friends, Re (1916), 36 O.L.R. 30, followed.] — See INSURANCE, 5.

Bank of Hamilton v. Halstead (1897), 28 S.C.R. 235, distinguished.] — See BANKS AND BANKING.

Barnett v. Eastman (1898), 67 L.J.N.S.Q.B. 517, followed.] — See ATTACHMENT OF DEBTS, 2.

Bell v. Ross (1885), 10 A.R. 458, distinguished.] — See ASSIGNMENTS AND PREFERENCES, 2.

Bland v. Brown (1916), 37 O.L.R. 534, distinguished.] — See APPEAL, 2.

Boyd v. Haynes (1869), 5 P.R. 15, referred to.] — See ATTACHMENT OF DEBTS, 1.

Caledonian R.W. Co. v. Glenboig Union Fireclay Co., [1911]

CASES—(Continued).

A.C. 290, applied and followed.]
—See RAILWAY, 2.

Chamberlayne v. Brockett,
(1872), L.R. 8 Ch. 206, followed.]
—See WILL, 2.

Chambers v. Jaffray (1906),
12 O.L.R. 377, approved.]—See
CONSTITUTIONAL LAW, 1.

Chinnery v. Evans (1864), 11
H.L.C. 115, referred to.]—See
CONTRACT, 1.

Clarkson v. Dominion Bank
(1916), 37 O.L.R. 591, affirmed.]
—See BANKS AND BANKING.

Cockburn v. Edwards (1881),
18 Ch. D. 449, referred to.]—
See CONTRACT, 1.

Cocks v. Manners (1871), L.R.
12 Eq. 574, followed.]—See WILL,
2.

Commissioner for Railways v.
Brown (1887), 13 App. Cas. 133,
134, referred to.]—See STREET
RAILWAY, 1.

Daimler Co. Limited v. Con-
tinental Tyre and Rubber Co.
(Great Britain) Limited, [1916],
A.C. 307, followed.]—See ALIEN
ENEMY.

Darling, In re, [1896] 1 Ch. 50,
followed.]—See WILL, 2.

Davidson v. Great West Saddlery
Co. (1917), 35 D.L.R. 526, 27
Man. R. 576, opinion of PERDUE,
J.A., followed.]—See CONSTITU-
TIONAL LAW, 2.

Deere (John) Plow Co. Limited
v. Wharton, [1915] A.C. 330, fol-
lowed.]—See CONSTITUTIONAL
LAW, 2.

Dodge v. Smith (1902), 3
O.L.R. 305, reversed.]—See LIM-
ITATION OF ACTIONS.

Dyson v. Attorney - General,
[1911] 1 K.B. 410, [1912] 1 Ch.
158, followed.]—See PLEADING.

CASES—(Continued).

Feather v. The Queen (1865), 6
B. & S. 257, referred to.]—See
NEGLIGENCE, 2.

Garnett, In re (1885), 31 Ch. D.
1, followed.]—See TRUSTS AND
TRUSTEES, 2.

Gault v. Murray (1892), 21
O.R. 458, applied and followed.]
—See INJUNCTION.

Gilroy v. Conn (1912), 3 O.W.N.
732, referred to.]—See ATTACH-
MENT OF DEBTS, 1.

Ginsberg, Re (1917), 40 O.L.R.
136, referred to.]—See EVIDENCE.

Graham v. Ontario Mutual
Insurance Co. (1887), 14 O.R.
358, followed.]—See INSURANCE,
3.

Gray v. McLennan (1886), 3
Man. R. 337, approved.]—See
FIXTURES.

Gray v. Town of Dundas (1886-
7), 11 O.R. 317, 13 A.R. 588,
followed.]—See DITCHES AND
WATERCOURSES ACT, 1.

Great Western R.W. Co. v.
Carpalla United China Clay Co.
Limited, [1910] A.C. 83, applied
and followed.]—See RAILWAY, 2.

Hallen v. Runder (1834), 1
C.M. & R. 266, followed.]—See
FIXTURES.

Harmer v. A. Macdonald Co.
Limited (1917), 33 D.L.R. 363,
followed.]—See CONSTITUTIONAL
LAW, 2.

Harmston v. Woods, Re (1917),
39 O.L.R. 105, referred to.]—
See APPEAL, 1.

Harrison and Micks Lambert
and Co., In re, [1917] 1 K.B. 755,
33 Times L.R. 221, specially re-
ferred to.]—See CONTRACT, 2.

Hartlepool Gas and Water Co.
v. West Hartlepool Harbour and

CASES—(Continued).

R.W. Co. (1885), 12 L.T.R. 366, followed.]—See PARTIES.

Hick v. Raymond & Reid, [1893] A.C. 22, followed.]—See CONTRACT, 3.

Hiscox v. Lander (1876), 24 Gr. 250, 266, referred to.]—See NEGLIGENCE, 2.

Holden v. Liverpool New Gas Co. (1846), 3 C.B. 1, 5, applied.]—See LANDLORD AND TENANT, 3.

Hollinshead v. Hazleton, [1916] 1 A.C. 428, referred to.]—See ATTACHMENT OF DEBTS, 1.

Horwich v. Symond (1914-15), 110 L.T.R. 1016, 84 L.J.K.B. 1083, followed.]—See FIXTURES.

Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited, [1899] 1 Q.B. 86, followed.]—See PLEADING.

Hulse, In re, [1905] 1 Ch. 406, not followed.]—See FIXTURES.

Imperial Paper Mills of Canada Limited v. Quebec Bank, (1913), 83 L.J.P.C. 67, 110 L.T.R. 91, followed.]—See BANKS AND BANKING.

Jackson v. Kassel (1867), 26 U.C.R. 341, approved.]—See BASTARD.

Janson v. Driefontein Consolidated Mines Limited, [1902] A.C. 484, followed.]—See ALIEN ENEMY.

Keefer v. Phœnix Insurance Co. of Hartford (1901), 31 S.C.R. 144, applied and followed.]—See INSURANCE, 1.

Lee v. Gaskell (1876), 1 Q. B.D. 700, referred to.]—See FIXTURES.

Loach v. British Columbia Electric R.W. Co., [1916] 1 A.C. 719, explained and followed.]—See NEGLIGENCE, 3.

McCabe v. Jeffrey (1917), 40

CASES—(Continued).

O.L.R. 376, note, followed.]—See INTEREST, 2.

McConnell v. McGee (1917), 39 O.L.R. 460, referred to.]—See APPEAL, 1.

McGillivray v. Township of Lochiel (1904), 8 O.L.R. 446, explained.]—See DITCHES AND WATERCOURSES ACT, 2.

McHugh v. Grand Trunk R.W. Co. (1901), 2 O.L.R. 600, 606, applied.]—See INSURANCE, 5.

McKillop, Township of, v. Township of Logan (1899), 29 S.C.R. 702, distinguished.]—See DITCHES AND WATERCOURSES ACT, 2.

McLaren v. Caldwell (1882), 29 Gr. 438, followed.]—See APPEAL, 2.

McLay and Co. v. Perry and Co. (1881), 44 L.T.R. 152, specially referred to.]—See CONTRACT, 2.

Maple Leaf Lumber Co. v. Caldbick and Pierce (1917), 39 O.L.R. 201, reversed.]—See SHERIFF.

Massie v. Toronto Printing Co. (1887), 12 P.R. 12, not followed.]—See ATTACHMENT OF DEBTS, 2.

Mayne v. Grand Trunk R.W. Co. (1880), 31 U.C.C.P. 248, referred to.]—See RAILWAY, 1.

Mitchell v. Fidelity and Casualty Co. of New York (1917), 38 O.L.R. 543, referred to.]—See APPEAL, 2.

Montreal Street R.W. Co. v. Normandin, [1917] A.C. 170, followed.]—See ONTARIO TEMPERANCE ACT, 2.

Moran v. Place, [1896] P. 214, followed.]—See COSTS.

Morris (Herbert) Limited v.

CASES—(Continued).

Saxelby, [1916] 1 A.C. 688, referred to.]—See COVENANT.

Neill v. Duke of Devonshire (1882), 8 App. Cas. 135, distinguished.]—See WAY.

North British R.W. Co. v. Budhill Coal and Sandstone Co., [1910] A.C. 116, applied and followed.]—See RAILWAY, 2.

North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited, [1914] A.C. 461, referred to.]—See COVENANT.

O'Driscoll v. Manchester Insurance Committee, [1915] 3 K.B. 499, referred to.]—See ATTACHMENT OF DEBTS, 1.

Oswald v. Whitman (1889), 29 N.S.R. 13, approved.]—See FIXTURES.

Otto v. Roger and Kelly (1917), 39 O.L.R. 127, affirmed.]—See DITCHES AND WATERCOURSES Act, 2.

Phelps v. Lord (1894), 25 O.R. 259, followed.]—See WILL, 2.

Piper v. Piper, [1876] W.N. 202, followed.]—See CONTEMPT OF COURT.

Plant v. Bourne, [1897] 2 Ch. 281, distinguished.]—See VENDOR AND PURCHASER.

Porter v. Freudenberg, [1915] 1 K.B. 857, followed.]—See ALIEN ENEMY.

Rainbow v. Juggins (1880), 5 Q.B.D. 422, followed.]—See ASSIGNMENTS AND PREFERENCES, 2.

Rex v. Azler (1917), 40 O.L.R. 304, referred to.]—See ONTARIO TEMPERANCE ACT, 6.

Rex v. Cantin (1917), 39 O.L.R. 20, 22, followed.]—See ONTARIO TEMPERANCE ACT, 6.

Rex v. Chappus (1917), 39

CASES—(Continued).

O.L.R. 329, 331, followed.]—See ONTARIO TEMPERANCE ACT, 6.

Rex v. Cook (1908), 18 O.L.R. 415, followed.]—See ONTARIO TEMPERANCE ACT, 6.

Rex v. Lamothe (1908), 18 O.L.R. 310, specially referred to.]—See CRIMINAL LAW, 2.

Rex v. Leach (1908), 17 O.L.R. 643, followed.]—See ONTARIO TEMPERANCE ACT, 2.

Rex v. LeClair (1917), 39 O.L.R. 436, followed.]—See ONTARIO TEMPERANCE ACT, 2, 6.

Rex v. Lewis (1903), 6 O.L.R. 132, distinguished.]—See WILL, 2.

Rex v. McDewitt (1917), 39 O.L.R. 138, followed.]—See ONTARIO TEMPERANCE ACT, 2.

Rex v. Owens (1915), unreported, followed.]—See CRIMINAL LAW, 1.

Rex v. Renaud (1909), 18 O.L.R. 420, 423, followed.]—See ONTARIO TEMPERANCE ACT, 6.

Rex v. St. Pierre (1902), 4 O.L.R. 76, followed.]—See ONTARIO TEMPERANCE ACT, 6.

Rex v. Titchmarsh (1914), 32 O.L.R. 569, specially referred to.]—See CRIMINAL LAW, 2.

Ross v. Hunter (1882), 7 S.C.R. 289, applied and followed.]—See DITCHES AND WATERCOURSES Act, 1.

Seymour v. Township of Maidstone (1897), 24 A.R. 370, followed.]—See DITCHES AND WATERCOURSES Act, 1.

Shaw v. Hossack (1917), 39 O.L.R. 440, reversed.]—See INTEREST, 2.

Sims & Co. v. Midland R.W. Co., [1913] 1 K.B. 103, followed.]—See CONTRACT, 3.

CASES—(Continued).

Sinclair v. Canadian Mutual Fire Insurance Co. (1876), 40 U.C.R. 206, 212, followed.]—See INSURANCE, 3.

Skillings v. Royal Insurance Co. (1902-3), 4 O.L.R. 123, 6 O.L.R. 401, applied.]—See INSURANCE, 2.

Smith v. Day (1882), 21 Ch.D. 421, 427, applied and followed.]—See INJUNCTION.

Stack v. T. Eaton Co. (1902), 4 O.L.R. 335, followed.]—See FIXTURES.

Steggles v. New River Co. (1863), 11 W.R. 234, applied.]—See LANDLORD AND TENANT, 3.

Sticklehorne v. Hatchman (1586) Owen 43, applied.]—See LANDLORD AND TENANT, 3.

Stourcliffe Estates Co. Limited v. Bournemouth Corporation, [1910] 2 Ch. 12, distinguished.]—See EASEMENT.

Swale v. Canadian Pacific R.W. Co. (1913), 29 O.L.R. 634, distinguished.]—See RAILWAY, 1.

Symington v. Caledonian R.W. Co., [1912] A.C. 87, applied and followed.]—See RAILWAY, 2.

Taylor v. New South Wales Bank (1886), 11 App. Cas. 596, followed.]—See ASSIGNMENTS AND PREFERENCES, 2.

Tebbits Brothers v. Smith (1917), 33 Times L.R. 260, 508, [1917] W.N. 130, 241, explained.]—See CONTRACT, 2.

Thornton v. Howe (1862), 31 Beav. 14, followed.]—See WILL, 2.

Toronto R.W. Co. v. King, [1908] A.C. 260, 270, referred to.]—See STREET RAILWAY, 1.

Toronto R.W. Co. v. Toronto

CASES—(Continued).

Corporation, [1906] A.C. 117, followed.]—See INTEREST, 1.

University of London Medical Sciences Institute Fund, In re, [1909] 2 Ch. 1, followed.]—See WILL, 2.

Vanzant v. Coates (1917), 39 O.L.R. 557, affirmed.]—See GIFT.

Ward v. Benson (1901), 2 O.L.R. 366, followed.]—See COSTS.

CERTIORARI.

See ONTARIO TEMPERANCE ACT, 6.

CHARITABLE GIFTS.

See LUNATIC—WILL, 2.

CHILDREN'S PROTECTION ACT.

See CRIMINAL LAW, 1.

CHRISTIAN SCIENCE.

See WILL, 2.

CHURCH.

See WILL, 2.

COLLISION.

See NEGLIGENCE, 3.

COMMISSIONER OF JUVENILE COURT.

See CRIMINAL LAW, 1.

COMMITTAL.

See CONTEMPT OF COURT—EVIDENCE.

COMMON PROSTITUTE.

See CRIMINAL LAW, 2, 3.

COMPANY.

Winding-up of Retail Trading-company—Wholesale Creditor's Claim for Price of Goods Sold

COMPANY—(Continued).

on Credit—Preference or Priority over Ordinary Creditors—Fraud—Failure to Prove—Affirmance of Contract—Property in Goods and Possession, when Passing—Intention of Parties—Sale from Samples, not by Sample—Goods Shipped from Abroad—Freight Paid by Purchaser—Right of Inspection — Acceptance.]—Goods were sold on credit by a wholesale company in Scotland to a retail company in Ontario; the latter became insolvent, after the goods had been received; and the wholesale company made a claim as creditors in winding-up proceedings:—*Held*, that there was no ground for a charge of fraud: the sale was not made in reliance upon any false statement as to the solvency of the buyers, and there was no evidence that they bought with the intention of not paying for the goods; and, if the contract had been brought about by the fraud of the buyers, there was no rescission by the sellers; but, on the contrary, an affirmance.—The facts of the case did not bring it within the rule that where the sale is on credit the seller is excused from delivery if the buyer has become insolvent: no such circumstances had been proved as would absolve the sellers from their obligations under the contract. Those obligations had been fulfilled: the property in and the possession of the goods had passed to the buyers before the insolvency. — The property passes when the parties to the contract intended it to pass—their agreement governs. The sale was not a sale by sample, but

COMPANY—(Continued).

a sale from samples; it was not a case where the intention of the parties must have been that the property should not pass until the buyers had inspected the goods and found them to be equal to sample; the property passed on or before the 20th January, 1915, when the goods were delivered to the carriers for and in the name of the buyers: and the possession passed then too, by the sending to them of the bills of lading made out in their favour. *Re Faulkners Limited, Arthur & Co. (Export) Limited's Claim*, 75.

See CONSTITUTIONAL LAW, 2—FINES AND PENALTIES—WRIT OF SUMMONS.

COMPENSATION.

See EASEMENT—MUNICIPAL CORPORATIONS—RAILWAY, 2.

CONDITION.

See INSURANCE—VEXATIOUS PROCEEDINGS.

CONDITIONAL APPEARANCE.

See WRIT OF SUMMONS.

CONDUCT.

See SHERIFF.

CONSTITUTIONAL LAW.

1. *Evidence Act, R.S.O. 1914, ch. 76, sec. 7—Intra Vires—Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 38—Examination of Assignor after Assignment for Benefit of Creditors—Refusal to Answer Questions Tending to Criminate—Privilege—Abrogation by Provincial Stat-*

CONSTL. LAW—(Continued).

ute—Criminal Law—Canada Evidence Act, R.S.C. 1906, ch. 145, secs. 2, 5—Protection Afforded by Statutes—Sufficiency.]—Upon the examination, under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, of a person who has made an assignment for the benefit of creditors under the Act, he has no right to refuse to answer questions put to him, on the ground that his answers would tend to criminate him—the privilege to refuse to answer which formerly existed has been abrogated by legislative enactment, now contained in sec. 7 of the Ontario Evidence Act, R.S.O. 1914, ch. 76, and recognised by the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 5 (2).—The contention that this privilege was part of the criminal law, and could not therefore be abrogated or restricted except by legislation of the Parliament of Canada, and that the provincial legislation which assumes to take it away is *ultra vires*, is not well-founded.—*Chambers v. Jaffray* (1906), 12 O. L. R. 377, approved.—The privilege is a civil right, and may be taken away by a Provincial Legislature as to matters with respect to which it has authority to legislate, as it has as to the matters dealt with by the Assignments and Preferences Act.—The question whether sufficient protection has been afforded by the provisions of the Dominion and Ontario Acts to the witness who has been compelled to answer is not for the Court.—*Semble*, if the privilege were part

CONSTL. LAW—(Continued).

of the criminal law, it had been abrogated by sec. 5 (1) of the Canada Evidence Act, as applied by sec. 2 of that Act.—The British North America Act, sec. 91 (27) and sec. 92 (13) and (14), considered. *Re Ginsberg*, 136.

2. *Extra-Provincial Corporation Act, R.S.O. 1914, ch. 179—Ultra Vires—Company Incorporated by Dominion Authority—Companies Act, R.S.C. 1906, ch. 79—Power of Province to Require License—Right to Hold Land in Province—Incapacity under Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103—Removal if License Obtained—Effect of sec. 12 of R.S.O. 1914, ch. 179—Action by Provincial Attorney-General—Judicature Act, R.S.O. 1914, ch. 56, secs. 16 (h), 20.*]—The provisions of the Extra-Provincial Corporations Act, R. S. O. 1914, ch. 179, in so far as they purport to apply to a company incorporated under Dominion authority, are *ultra vires*.—*John Deere Plow Co. Limited v. Wharton*, [1915] A. C. 330, the opinion of PERDUE, J. A., in *Davidson v. Great West Saddlery Co.* (1917), 35 D. L. R. 526, 27 Man. R. 576, and *Harmer v. A. Macdonald Co. Limited* (1917), 33 D. L. R. 363, followed.—The defendant company, incorporated by letters patent under the Dominion Companies Act, R. S. C. 1906, ch. 79, was *held*, not to be prohibited, by reason of not being licensed under the Extra-Provincial Corporations Act, from carrying out its objects and undertakings in the Province

CONSTL. LAW—(*Continued*).

of Ontario, and not to be subject to the penalties prescribed by the last-mentioned Act for carrying on business without being licensed.—That Act does not specifically prohibit a company such as the defendant company from acquiring and holding lands in the Province of Ontario; the incapacity to hold land arises from the provisions of the Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103; and, if a company obtained a license under the provisions of the Extra-Provincial Corporations Act, it would thereby receive authority to hold lands in Ontario in accordance with the provisions of sec. 12.—An action by the Attorney-General for Ontario for a declaration of the validity of a Provincial statute is maintainable; Judicature Act, R.S.O. 1914, ch. 56, secs. 16 (h) and 20. *Currie v. Harris Lithographing Co. Limited, Attorney-General for Ontario v. Harris Lithographing Co. Limited*, 290.

See ASSIGNMENTS AND PREFERENCES, 3—CRIMINAL LAW, 1—ONTARIO TEMPERANCE ACT, 6.

CONTEMPT OF COURT.

Failure of Defendant to Do Act Required by Judgment—Practice—Appropriate Remedy—Writ of Attachment—Notice of Motion for Order to Commit—Personal Service—Defendant not Appearing—Power to Order Issue of Writ—Rules 545, 546, 547.—The defendant was found to be in contempt for not producing and delivering to the plaintiff the

CON. OF COURT—(*Continued*).

possession of a certain infant, as required by a judgment of the Court.—The notice of motion was for an order to commit the defendant, and was served upon her personally with a copy of the judgment; but she did not appear upon the return. An order was made, not for committal, but for the issue of a writ of attachment, that being deemed the more appropriate remedy.—Rules 545, 546, and 547, considered.—Review of the English authorities.—*Held*, that there was power to order the issue of a writ of attachment, although the notice of motion was for an order to commit.—*Piper v. Piper*, [1876] W.N. 202, followed. *Link v. Thompson*, 222.

See EVIDENCE.

CONTRACT.

1. *Brokers—Dealings in Company-shares for Customer—Actual Transactions—Authority of Customer—Advances—Purchases—Sales—Credits—Account—Payments—Limitations Act—Starting-point.*—The plaintiffs, who were stockbrokers, during the period from September, 1904, to November, 1906, bought and sold shares in various companies for the defendant. In 1904, the parties made an agreement, which applied to all existing and future transactions. No shares were purchased after November, 1906. From that time on, the account kept by the plaintiffs consisted of debits of interest and credits of the sales of various stocks and dividends

CONTRACT—(Continued).

upon stocks. The account of sales was closed in May, 1913, when the plaintiffs sold some shares. The whole account shewed a balance due the plaintiffs on the 2nd May, 1913, of nearly \$4,000, for which the plaintiffs sued in this action:—*Held*, that the transactions were not illegal by reason of the prohibition of sec. 231 of the Criminal Code or otherwise, but were real transactions, purchases and sales of shares made in good faith on behalf and at the request of the defendant.—Every payment made and credit given by the plaintiffs from the sale of shares held by them for the defendant, or payment of dividends thereon, was a payment made by the defendant upon the account as it stood when the payment was made; each payment gave a new starting-point for the running of the Limitations Act; there never was a time between payments when six years had elapsed; and the Act never became effective to bar the plaintiffs' claim or any part thereof.—*Chinnery v. Evans* (1864), 11 H.L.C. 115, and *Cockburn v. Edwards* (1881), 18 Ch. D. 449, referred to. *Stark v. Somerville*, 374.

2. *Sale and Purchase of Goods at Price per Pound—Absence of Written Memorandum—Estimated Weight—Sale of Definite Quantity or of all Goods of Specified Kind in Vendor's Possession—Purpose of Purchase—Absence of Warranty of Quantity—Words Written on Cheque Given in Payment—Estoppel—Claim for*

CONTRACT—(Continued).

Damages for Shortage.]—The plaintiffs had in their yard a quantity of "scrapped" copper-wire, which they estimated at about 70 tons. The defendant negotiated with the plaintiffs' manager for the purchase of the wire, and was told that it had not been weighed, but was estimated at 70 tons. A bargain of sale and purchase was made at 15 cents per lb. There was no written memorandum of the bargain. The weight turned out to be only 100,700 lbs.:—*Held*, that the sale and purchase were not of 70 tons, neither more nor less, but were of all the scrapped copper-wire the plaintiffs had and were offering for sale.—Words written on the cheques given in payment simply earmarked the transaction in which they were given, and the cashing of them did not estop the plaintiffs from shewing the truth of the matter.—Review of the authorities.—*McLay and Co. v. Perry and Co.* (1881), 44 L.T.R. 152, and *In re Harrison and Micks Lambert and Co.*, [1917] 1 K.B. 755, 33 Times L.R. 221, specially referred to.—*Tebbits Brothers v. Smith* (1917), 33 Times L.R. 260, 508, [1917] W.N. 130, 241, explained. *London Electric Co. v. Eckert*, 208.

3. *Supply of Building Material—No Time Fixed for Performance—Reasonable Time Allowed—Delay from Unavoidable Cause—Strike of Workmen—No Delay Amounting to Breach—Refusal to Accept Material—Damages—Third Party Proceedings—Rule*

CONTRACT—(Continued).

155—*Claim Made by Defendants against Third Parties—Objection to Regularity not Made at Trial—Claim Determined in Action against Defendants—Material Ordered from Plaintiffs to be Supplied by Defendants to Third Parties—Failure to Supply within Reasonable Time—Dismissal of Claim—Appeal.*—No time being either expressly or by reference to known circumstances fixed for the performance of the plaintiffs' contract, they were entitled to a reasonable time, and had not exhausted that reasonable time when a strike took place, which caused delay; the time during which the strike lasted was not to be counted against the plaintiffs, it being attributable to causes beyond their control; after the strike there was no delay except such as was caused by it; no delay of the plaintiffs in the performance of their contract was a breach of it; and they were entitled to recover damages.—*Hick v. Raymond & Reid*, [1893] A.C. 22, and *Sims & Co. v. Midland R.W. Co.*, [1913] 1 K.B. 103, followed.—In respect of the defendants' claim against the third parties, the defendants failed to supply the material within a reasonable time, and so were guilty of a breach of their contract, and consequently could not enforce it or recover damages for a breach of it.—*Per* HODGINS, J.A., and RIDDELL, J.:—The case was not a proper one for third party proceedings—the loss of the defendants was due to their own act, and not to any act of the third parties. There was

CONTRACT—(Continued).

no ground for seeking indemnity or relief over: Rule 165.—*Per* MEREDITH, C.J.C.P., and LENNOX, J.:—Whether the third party proceedings were regular or irregular, no objection to them had been made by any party, the claim against the third parties had been adjudicated upon at the trial, and there was no reason for refusing to consider it on an appeal from the judgment at the trial. *Henry Hope & Sons Limited v. Canada Foundry Co.*, 338.

See ALIEN ENEMY—ASSIGNMENTS AND PREFERENCES — BANKS AND BANKING—COMPANY — INSURANCE — PARTIES — RAILWAY, 1 — TRIAL — VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE.

See MOTOR VEHICLES ACT— NEGLIGENCE, 3—STREET RAILWAY, 1, 2.

CONVEYANCE OF LAND.

See GIFT—TRUSTS AND TRUSTEES, 1.

CONVICTION.

See ONTARIO TEMPERANCE ACT—CRIMINAL LAW.

CORPORATION.

See COMPANY — MUNICIPAL CORPORATIONS.

COSTS.

Security for, by Defendant— Action Removed from Surrogate Court — "Plaintiff"— Real Actor — Plaintiff Propounding Will— Caveator Opposing Grant of Pro-

COSTS—(Continued).

bate—Rule 373—Judicature Act, sec. 2 (r).]—The lodging of a caveat is not the institution of proceedings in a Surrogate Court. The executor who propounds the will institutes the proceedings, and the onus is upon him to prove it.—In an action removed from a Surrogate Court into the Supreme Court of Ontario, a motion by the plaintiff, the executor who propounded the will, for an order requiring the defendant, the caveator, who was resident out of Ontario, to give security for costs, was dismissed.—Clauses (a) to (i) of Rule 373 provide for the giving of security by a plaintiff; a “plaintiff” is defined by sec. 2 (r) of the judicature Act; clause (j) of Rule 373 applies to a different case.—*Ward v. Benson* (1901), 2 O.L.R. 366, and *Moran v. Place*, [1896] P. 214, followed. *Newcombe v. Evans*, 299.

See ALIEN ENEMY—EASEMENT—FINES AND PENALTIES—INJUNCTION—INTEREST, 1—SHERIFF—VEXATIOUS PROCEEDINGS.

COUNTY COURT JUDGE.

See DITCHES AND WATERCOURSES ACT, 2—LANDLORD AND TENANT, 2.

COURTS.

See APPEAL—COSTS—CRIMINAL LAW, 1—INJUNCTION.

COVENANT.

Restraint of Trade—Sale of Business including Goodwill—Undertaking of Vendor not to Carry on Business in same City—

COVENANT—(Continued).

Restraint Unlimited as to Time and Wide as to Space—Reasonable Necessity for—Breach of Undertaking—Pleading—Perpetual Injunction—Damages.]

—The defendant, a Ruthenian grocer, sold to the plaintiff, a fellow-countryman, the stock in trade and goodwill of a grocery-business carried on in the city of Toronto. The defendant agreed not “to open store” in Toronto; but, very soon after the sale and receipt of the purchase-price, which included \$300 for the goodwill, the defendant opened a grocery-store in the neighbourhood of the store which he had sold; and to the defendant’s new store customers of the old one were attracted. It was conceded that Ruthenians prefer to deal with people of their own race and usually do so:—*Held*, that the protection which the restraint was designed to afford was not greater than was reasonably necessary for the protection of the plaintiff in the enjoyment of the goodwill; that there was nothing to warrant a finding that it was injurious to the public; and that the contract of the defendant was, therefore, a valid and binding one.—The distinction, as to the nature and extent of the restriction that may be imposed, between cases where the agreement is entered into by the vendor of the business, and cases where the agreement is entered into by an employee or servant, pointed out.—*Herbert Morris Limited v. Saxelby*, [1916] 1 A.C. 688, referred to.—Where the contract

COVENANT—(Continued).

is *ex facie* illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule the Court will not entertain the question unless it is raised by the pleadings.—*North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited*, [1914] A.C. 461, referred to.—A restraint unlimited as to time is not necessarily invalid. *Mizon v. Pohoretzky*, 239.

CRIMINAL LAW

1. *Contributing to Making Child a "Neglected Child"*—*Children's Protection Act of Ontario*, R.S.O. 1914, ch. 231, sec. 18 (d)—*Conviction of Mother's Paramour*—*Jurisdiction of Commissioner of Juvenile Court*—*Evidence*—*Offence not Disclosed*—*Absence of Actual Injury to Child*—*Powers of Provincial Legislature*—*Statutory Crime*—*Creation of Tribunal*.]—Under sec. 18 (d) of the *Children's Protection Act of Ontario*, which enacts that any person who is guilty of an act or omission which contributes to a child being or becoming a neglected child, shall incur a penalty and be liable to imprisonment, there is no right to punish unless it is shewn that there was an actual injury to the child; when the child is of such tender years as to be unable to appreciate the moral quality of its mother's conduct, her adultery does not *ipso facto* make the child a neglec-

CRIMINAL LAW—(Continued).

ted child within the meaning of the Act; and the adulterer cannot be convicted of contributing to making the child a neglected child.—*Rex v. Owens* (1915), an unreported decision of CLUTE, J., followed.—Conviction by the Commissioner of the Juvenile Court for the City of Toronto, under sec. 18 (d), quashed on the ground that the evidence did not disclose an offence against the statute.—*Semble*, that in this enactment the Ontario Legislature has exceeded its powers, has made a statutory crime, and has made it punishable before a tribunal of its own creation, although the Provincial authorities have not the power to appoint Judges. *Rex v. Davis*, 352.

2. *Vagrancy*—*Common Prostitute*—*Police Magistrate's Conviction*—*Criminal Code*, secs. 238 (i), 239—*Form of Conviction*—*Description of Offence*—"Satisfactory Account of herself"—*Order Dismissing Application to Quash Conviction*—*Motion for Leave to Appeal*—*Right to Appeal*—*Rule 1287* (27th March, 1908)—*Power to Make*—*Criminal Code* sec. 576—*Habeas Corpus*—*Motion for Discharge of Defendant from Custody under Warrant of Commitment in Terms of Conviction*—*Effect of Order upon Motion to Quash*—*Judicature Act*, sec. 32—*Appeal from Order Dismissing Application to Discharge*—*Right of Appeal*—*Res Adjudicata*—*Arrest without Warrant*—*Information*—*Complaint*—*Depositions of Witnesses*—*Verification*—*Code*, secs. 683, 716, 721—*Jurisdiction of*

CRIMINAL LAW—(Continued).

Magistrate—Conviction ex Facie Bad Saved by sec. 1124 of Code—Evidence to Support Conviction.]—The defendant was arrested as a common vagrant—a prostitute plying her trade in a public place—and was summarily convicted by a magistrate: Criminal Code, secs. 238 (*i*), 239. A motion to quash her conviction was dismissed by a Judge in Chambers; leave to appeal was refused by another Judge; the defendant, being imprisoned under the conviction, obtained a *habeas corpus*; a motion for her discharge was refused by a third Judge in Chambers; and she appealed to a Divisional Court; the appeal was dismissed (MAGEE, J.A., and CLUTE, J. dissenting). A number of points (set out in the report and in the head-note and indicated by the above catch-words) were discussed and ruled upon, and leading authorities were reviewed. *Rex v. Titchmarsh* (1914), 32 O.L.R. 569, and *Rex v. Lamothe* (1908), 18 O.L.R. 310, were specially referred to. *Rex v. Jackson*, 173.

3. *Vagrancy—Criminal Code, secs. 238, 239—Prostitution in Private Boarding-house—Conviction by Police Magistrate—No Evidence to Sustain—Improper Admission of Evidence as to Venereal Disease—Prejudice—Grounds for Quashing Conviction.*]—There is nothing in any of the clauses of sec. 238 of the Criminal Code, R.S.C. 1906, ch. 146, since the repeal of (*j*) and (*k*) by 5 Geo. V. ch. 12, sec. 7, which can be relied upon to make immor-

CRIMINAL LAW—(Continued).

ality in a private house evidence of vagrancy. — The defendant was convicted by a magistrate “of being a vagrant.” Upon a motion to quash the conviction, the only evidence returned by the magistrate was, that on several occasions the defendant had received money “for immoral purposes;” that one man had been infected with venereal disease; and that, upon examination, the defendant was found to be diseased. The defendant had been employed as a servant in a boarding-house, and the acts of immorality had been with boarders:—*Held*, that there was no evidence to support the conviction.—Clause (*l*) of sec. 238 did not apply, because that clause is not aimed at the prostitute, and because there was no evidence that the defendant had no peaceable profession or calling by which to maintain herself—and the receipt of \$2 on each of two occasions did not shew that she for the most part supported herself by the avails of prostitution. —*Held*, also, that evidence of the diseased condition of the defendant was improperly admitted, to her possible prejudice; and on that ground, as well as on the other, the conviction should be quashed. *Rex v. Weller*, 296.

See ONTARIO TEMPERANCE ACT.

CROWN.

See NEGLIGENCE, 2.

CUSTOMER.

See ATTACHMENT OF DEBTS, 1

—BANKS AND BANKING—CON-

CUSTOMER—(*Continued*).

TRACT, 1—VEXATIOUS PROCEEDINGS.

DAMAGES.

See CONTRACT, 2—COVENANT — FIXTURES — INJUNCTION — LANDLORD AND TENANT, 3—RAILWAY, 1—TRIAL.

DEATH.

See NEGLIGENCE, 1—PROMISORY NOTE.

DECLARATORY JUDGMENT.

See PLEADING.

DEDICATION.

See WAY.

DEED.

See GIFT — LANDLORD AND TENANT, 1—LIMITATION OF ACTIONS—TRUSTS AND TRUSTEES, 1.

DELAY.

See CONTRACT, 3.

DEPORTATION.

See TRIAL.

DEPOSIT.

See HUSBAND AND WIFE.

DEPOSITIONS.

See CRIMINAL LAW, 2—ONTARIO TEMPERANCE ACT, 2.

DESISTMENT.

See MUNICIPAL CORPORATIONS.

DEVISE.

See WAY.

DISCHARGE.

See ASSIGNMENTS AND PREFERENCES, 2.

DISCRETION.

See INJUNCTION—INTEREST, 1—MORTGAGE, 1.

DISTRESS.

See ONTARIO TEMPERANCE ACT, 3.

DITCHES AND WATER-COURSES ACT.

1. Award of Township Engineer — Construction of Ditches — Lowering of Culvert—Injury to Land by Increasing Volume of Water Brought upon it—Liability of Township Corporation — Responsibility for Acts and Omissions of Engineer—Liability of Individual Land-owners for Lowering of Culvert—Wrongful Act—Continuing Wrong—Consequences since Acquisition of Land by Plaintiff — Unregistered Award — “Instrument Affecting the Land” — Registry Act, secs. 2 (d), 71 (1) — Purchaser for Value without Notice—Easement.] — The effect of an award under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, is to subject the lands affected by it to an easement; and it is, therefore, an “instrument affecting the land” within the meaning of secs. 2 (d) and 71 (1) of the Registry Act, R.S.O. 1914, ch. 124.—*Ross v. Hunter* (1882), 7 S.C.R. 289, applied and followed.—Where an award had been made under the Ditches and Watercourses Act, and had not been registered, it was held, that, as against the plaintiff, who, at the time of the registration of the conveyance to him of a parcel of land which was affected by the award, had no notice of the existence of the

DIT. & WAT. ACT—(Continued).

award or of the award-drains, the award conferred no right upon the individual defendants, who, as the plaintiff complained, had lowered a certain culvert, and thereby caused more water flowing from the upper land to pass through the culvert upon his land, to bring down the surface water from their lands upon his land, or to increase the volume of the water which would naturally flow upon it, or the rapidity of its flow.—*Semble*, even if the award were binding on the plaintiff, there was no legal justification for the lowering of the culvert.—And *held*, that the wrong was a continuing one; and, although the acts of which the plaintiff complained were done before he became the owner of the land, these defendants were answerable to him for the consequences of the wrong to him since he became the owner.—But the defendant township corporation was not liable to the plaintiff: the lowering of the culvert was not done by it or by its authority; and it was not responsible for the making of the ditches for which the award provided. — The engineer who made the award was, in the performance of his duties, a statutory officer, and the corporation was not answerable for anything done or omitted by him in the performance of his duties under the Act.—*Gray v. Town of Dundas* (1886-7), 11 O.R. 317, 13 A.R. 588, and *Seymour v. Township of Maidstone* (1897), 24 A.R. 370, followed. *Delbridge v. Township of Brantford*, 443.

DIT. & WAT. ACT—(Continued).

2. Award of Township Engineer—Objections of Land-owner—Proceedings Initiated by another Owner—Next Step Taken by Owner's Wife—R.S.O. 1914, ch. 260, sec. 13—Personal Attendance of Engineer—Sec. 16—Drain Crossing Lines of Dominion Railway—Approval of Board of Railway Commissioners not Obtained—Insufficient Outlet—Sec. 6—Action to Restrain Engineer and Contractor from Proceeding under Award—Remedy by Appeal to County Court Judge—Effect of secs. 21, 22, 23,—Curative Provisions.]—Certain objections to an award, made by a township engineer, under the provisions of the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, were *held* to come within the provisions of secs. 21, 22, and 23 of the Act, as relating to matters which should have been dealt with by the County Court Judge upon an appeal under sec. 21; and, there having been no such appeal, the award was *held* to be valid and binding, under sec. 23. Anything that can be remedied by an appeal is covered by the curative clause, sec. 23.—*Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702, distinguished. *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446, explained.—Judgment of SUTHERLAND, J., 39 O.L.R. 127, affirmed. *Otto v. Roger and Kelly*, 381.

DIVISION COURTS.

See APPEAL, 1.

DRAINAGE.

See DITCHES AND WATER-COURSES ACT.

DRUGGIST.

See ONTARIO TEMPERANCE ACT, 6.

EASEMENT.

Expropriation by Power Company—Compensation to Land-owner—Award—Notice of Expropriation—Acquisition of Larger Powers than actually Used—Damage or Depreciation from Possession and Potential Use—2 Edw. VII. (D.) ch. 107, secs. 12, 21—Railway Act of Canada, 1888, sec. 146—Power of Company to Bind itself not to Exercise Powers Vested in it—Reference back to Arbitrators—Costs.]—Upon an appeal from an award fixing the amount of compensation to be paid to a land-owner in respect of an easement expropriated by the company under the powers conferred by the Dominion statute incorporating it, 2 Edw. VII. ch. 107, sec. 21 (c.), an order referring the matter back to the arbitrators was made. Pursuant to this order, the majority of the arbitrators made an award for a small sum; and it was held, upon appeal, that what was really in issue was the damage or depreciation caused by reason of the possession and potential use by the company of its unused powers—what was to be valued was the property in the owner's hands, subject to the restrictions or easements by which it was affected, though their discharge or the unlikelihood of their use or enforcement must be

EASEMENT—(Continued).

considered in ease of the loss.—*Held*, also, that it was beyond the power of the company to enter into an agreement to limit the easement to that actually in use.—Sections 12 and 21 of the incorporating Act, 2 Edw. VII. ch. 107, and sec. 146 of the Railway Act, 51 Vict. ch. 29, considered.—*Ayr Harbor Trustees v. Oswald* (1883), 8 App. Cas. 623, followed.—*Stourcliffe Estates Co. Limited v. Bournemouth Corporation*, [1910] 2 Ch. 12, distinguished.—The award could not be interfered with on the ground that the arbitrators had no right to deal with the costs of the former arbitration: the statute where applicable must govern.—The award was set aside, and the matter again referred back to be considered by the arbitrators. *Re Coleman and Toronto and Niagara Power Co.*, 130.

See DITCHES AND WATER-COURSES ACT, 1—WAY.

EJECTMENT.

See LANDLORD AND TENANT, 2.

ENEMY.

See ALIEN ENEMY—TRIAL.

ENGINEER.

See DITCHES AND WATER-COURSES ACT.

ESTOPPEL.

See CONTRACT, 2—FIXTURES — LIMITATION OF ACTIONS — SHERIFF.

EVIDENCE.

Motion to Commit for Contempt of Court—Witnesses Examined on

EVIDENCE—(Continued).

Motion—Refusal to Answer Questions—Motion to Compel Answers—Practice—Motion Made in Action and Directed to Witnesses—Separate School Board—Liability to Criminal Prosecution—Apprehension of Witnesses—Protection under Evidence Act, sec. 7—Rules 228, 338-341, 545—Criminal Code, secs. 164, 165, 390—Separate Schools Act, R.S.O. 1914, ch. 270, sec. 99—Disobedience of Judgment—Paying Salaries to Unqualified Teachers—Welfare of School-children—Excuse for Refusal to Answer.]—A motion to compel G. and others to answer questions upon their examination as witnesses upon a pending motion, was *held* to have been properly made in the action in which judgment had been recovered: it was not necessary to begin an independent proceeding by originating notice, making G. and the others parties; the notice of motion was directed to the persons individually affected, and that was sufficient.—*Held*, also, that there could be no reasonable apprehension on the part of G. or the other witnesses that by answering the questions which they refused to answer they would make themselves or others liable to a criminal prosecution: the witnesses themselves were fully protected under sec. 7 of the Evidence Act, R.S.O. 1914, ch. 76; the defendant school board could not be proceeded against criminally; and the statement of one member of the board, made upon an examination in a civil action, could not be used against another in a criminal

EVIDENCE—(Continued).

proceeding.—*Re Ginsberg* (1917), 40 O.L.R. 136, referred to.—Consideration of Rules 228, 338 to 341, and 545; sec. 164, 165, and 390 of the Criminal Code; and sec. 99 of the Separate Schools Act, R.S.O. 1914, ch. 270.—*Held*, also, that three members of a religious teaching fraternity, who were employed by the defendant board as teachers, were not excused from answering questions, as to salaries paid to them, on the ground that they had made perpetual vows to devote themselves to the welfare of children and their own sanctification, and that the interests of the school-children might be prejudiced if they answered the questions. *Mackell v. Ottawa Separate School Trustees*, 272.

See CONSTITUTIONAL LAW, 1—
CRIMINAL LAW—FIXTURES —
GIFT—HUSBAND AND WIFE—
LIMITATION OF ACTIONS—MORT-
GAGE, 2—NEGLIGENCE—ONTAR-
IO TEMPERANCE ACT — STREET
RAILWAY — TRIAL — VENDOR
AND PURCHASER—WAY.

**EXAMINATION OF
ASSIGNOR.**

See CONSTITUTIONAL LAW, 1.

**EXAMINATION OF
WITNESSES.**

See EVIDENCE.

EXCESSIVE DAMAGES.

See TRIAL.

EXECUTION.

See APPEAL, 2—ATTACHMENT
OF DEBTS—SHERIFF.

EXECUTION OF DEED.

See LANDLORD AND TENANT, 1.

EXEMPTIONS.

See ASSESSMENT AND TAXES, 3.

EXPERT TESTIMONY.

See MORTGAGE, 2.

EXPROPRIATION.

See EASEMENT—MUNICIPAL CORPORATIONS—RAILWAY, 2.

EXTRA-PROVINCIAL CORPORATIONS ACT.

See CONSTITUTIONAL LAW, 2.

FATAL ACCIDENTS ACT.

See NEGLIGENCE, 1.

FIDUCIARY RELATION.

See GIFT.

FINES AND PENALTIES.

Action for Penalties—Company—Default in Making Government Returns—Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 135—Remission of Penalties—Fines and Forfeitures Act, R.S.O. 1914, ch. 99, sec. 6—Application to Court—"Court or Judge having Cognizance of the Proceedings"—Action in Supreme Court of Ontario—Forum—Master in Chambers—Jurisdiction—Judge in Court—Rules 205, 207—Terms of Remission—Restoration of Plaintiff to former Position—Payment of Costs.]—The jurisdiction given by sec. 6 of the Fines and Forfeitures Act, R.S.O. 1914, ch. 99, to "the Court or Judge having cognizance of the proceedings for the recovery" of a fine, penalty, or forfeiture, to remit "such fine, penalty, or forfeiture," cannot be exercised, where the action to

FINES AND PEN.—(Continued).

recover the fine, penalty, or forfeiture, is brought in the Supreme Court of Ontario, by the Master in Chambers; but may be exercised by a Judge, sitting in Court, at any time after the commencement of the action.—Rules 205 and 207 considered.—Upon application by the defendants to Judge in Court, an order was made, under sec. 6 (as above), remitting penalties incurred under the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 135, upon the terms that the defendants should repay to the plaintiff the money received from her for certain company-shares, with interest at 6 per cent., and her costs as between solicitor and client of this and a former action and of certain proceedings before the Attorney-General. *Seagram v. Pneuma Tubes Limited*, 301.

FIRE.

See NEGLIGENCE, 2.

FIRE INSURANCE.

See INSURANCE, 1, 2, 3.

FIXTURES.

Wooden Building Erected by Tenant on Demised Land—Ownership—Chattel—Affixing to Freehold—Severance—Evidence—Right of Removal—Privilege—License—Provision in Informal Lease—Estoppel—Assignable Rights—Succession of Tenants—Reasonable Time for Removing Building—Damages—Nominal Damages—Trespass.]—A wooden building, erected upon the plaintiff's land by a tenant,

FIXTURES—(Continued).

was held to be a chattel and not part of the land; and the judgment of the County Court of the County of Hastings dismissing an action brought to recover damages for the removal of the building from the land, was affirmed.—The tenant who built the house sold it to D. Bros., his successors in the tenancy. In the written lease to D. Bros., signed but not sealed by the plaintiff, it was expressly provided that "D. Bros. are to have the privilege to move the house . . . at the end of eight years," but that "D. Bros. are to give" the plaintiff "the first chance to buy at the end of the eight years." The plaintiff was given the opportunity to buy at the end of the period, but refused it. The building was sold by D. Bros. to G. and by G. to C.:—*Held*, by MEREDITH, C.J.C.P., that the lease was not a mere license; the "privilege" expressed in it was not mere leave, but an essential part of the lease.—*Per* RIDDELL and LENNOX, JJ.:—The house was the property of the tenant who built it; by the sale to D. Bros. it became theirs, and by the sales to G. and C. the property of each in succession. If the agreement of the plaintiff contained in the lease was to be considered, the right of a tenant to remove a building is a power or license coupled with an interest, and is assignable.—*Oswald v. Whitman* (1889), 22 N.S.R. 13, and *Gray v. McLennan* (1886), 3 Man. R. 337, approved.—*Per* ROSE, J.:—Assuming that the building was

FIXTURES—(Continued).

affixed to the land, as might fairly be inferred from the evidence, it became part of the land.—*Horwich v. Synod* (1914-15), 110 L.T.R. 1016, 84 L.J.K.B. 1083, *Hallen v. Runder* (1834), 1 C.M. & R. 266, and *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, preferred to *In re Hulse*, [1905] 1 Ch. 406.—When the house became part of the land, as between the plaintiff and the tenant who built the house, it remained subject to his right to bring it back to the state of a chattel again, by severing it from the land; that right was assignable, and no deed or even writing was necessary.—*Hallen v. Runder, supra*, and *Lee v. Gaskell* (1876), 1 Q.B.D. 700, referred to on this point. *Devine v. Callery*, 505.

FORECLOSURE.

See MORTGAGE, 1.

FOREIGN DEFENDANTS.

See ONTARIO TEMPERANCE ACT, 5—WRIT OF SUMMONS.

FORFEITURE.

See FINES AND PENALTIES—INSURANCE, 3.

FORUM.

See APPEAL, 1, 2—FINES AND PENALTIES—INJUNCTION.

FRACTION OF DAY.

See LANDLORD AND TENANT, 1.

FRAUD.

See ATTACHMENT OF DEBTS, 1
—COMPANY—PROMISSORY NOTE
—SHERIFF—TRUSTS AND TRUSTEES—VEXATIOUS PROCEEDINGS.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GAS.

See PARTIES.

GIFT.

Parent and Child—Voluntary Conveyance of Land—Fiduciary Relation—Presumption of Undue Influence — Evidence — Onus — Findings of Trial Judge—Appeal.] —The judgment of MULOCK, C.J. Ex., 39 O.L.R. 557, setting aside a conveyance of land made to the plaintiff by the mother of the plaintiff and the defendant, was affirmed.—Review of the authorities. Vanzant v. Coates, 556.

See HUSBAND AND WIFE—WILL.

GOODWILL.

See COVENANT.

GUARANTY.

See ASSIGNMENTS AND PREFERENCES, 2.

GUARDIAN.

See LUNATIC.

HABEAS CORPUS.

See CRIMINAL LAW, 2.

HEALTH.

See NEGLIGENCE, 1.

HIGHWAY.

See MOTOR VEHICLES ACT—MUNICIPAL CORPORATIONS—NEGLIGENCE, 2—WAY.

HOSPITAL FOR INSANE.

See INSURANCE, 4.

HUSBAND AND WIFE.

*Money Deposited in Bank to Joint Credit of—Written Direction to Bank—"Our joint Property"—Claim of Wife to Half of Money—Evidence — Admission — Origin of Fund—Beneficial Interest of Wife—Savings from Housekeeping Allowance—Gift from Husband —Special Purpose of Deposit.] —The plaintiff and defendant—wife and husband—opened a joint account in a bank in May, 1915, and both signed a direction to the bank: "All moneys which may be deposited by us or either of us to the said account are our joint property, but such moneys may be withdrawn by either one of us, or the survivor of us." The money deposited to the credit of the account was all the defendant's, and the purpose for which it was deposited, viz., to pay the expenses of the plaintiff and her child, during the defendant's absence, and to make payments in connection with the defendant's property, was shewn in evidence:—*Held*, that the plaintiff was not entitled to half the money to the credit of the account at the time of the commencement of this action in September, 1916. *Southby v. Southby*, 429.*

See PROMISSORY NOTE.

ILLEGITIMATE CHILDREN'S ACT.

See BASTARD.

INCENDIARISM.

See INSURANCE, 3.

INCOME TAX.

See ASSESSMENT AND TAXES, 3.

INCOMPETENCE.

See LUNATIC.

INCONSISTENT GIFTS.

See WILL, 1.

INDIAN.

See ONTARIO TEMPERANCE ACT, 3.

INFECTIOUS DISEASES.

See NEGLIGENCE, 1.

INFORMATION.

See ONTARIO TEMPERANCE ACT, 3.

INJUNCTION.

Interim Order Obtained by Plaintiff — Undertaking as to Damages—Dismissal of Action without Costs—Application by Defendant for Inquiry as to and Payment of Damages—Forum—Discretion — Refusal — Special Circumstances.]—An application for an order directing an inquiry as to and payment of the damages occasioned to the defendant by reason of an interim injunction obtained by the plaintiff upon the usual undertaking as to damages, and dissolved by the judgment in the action, should be made to the trial Judge.—Smith v. Day (1882), 21 Ch.D. 421, 427, and Gault v. Murray (1892), 21 O.R. 458, applied and followed.—Such an application is in the discretion of the Judge.—The circumstances of this case warranted the conclusion that, if the defendants had suffered damages by reason of the injunction, they were not such damages as the plaintiffs ought to pay; and the defendants' application for

INJUNCTION—(Continued).

an order for an inquiry and payment was dismissed with costs.—Review of the authorities. Upper Canada College v. City of Toronto, 483.

See APPEAL, 2—COVENANT—PARTIES.

INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES — ATTACHMENT OF DEBTS, 1, 2—BANKS AND BANKING—COMPANY.

INSPECTION.

See COMPANY.

INSPECTOR OF PRISONS AND PUBLIC CHARITIES

See INSURANCE, 4.

INSURANCE.

1. *Fire Insurance — Chattels Owned by Different Members of one Family—Insurance in Name of one —“Insurable Interest” —“Direct Loss” —Right to Recover for Whole Damage—Proofs of Loss—Time of Delivery—Post-letter—Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194, conditions 18, 22—Time when Loss Payable—Commencement of 60-day Period—Action not Prematurely Brought — Non-compliance with Conditions as to Proof—Relief under sec. 199.]—Upon a fire insurance policy issued by the defendants, insuring household furniture, “the property of the assured or of any member of the assured's family,” contained in a certain dwelling-house, the plaintiff was held, to have “an insurable interest” and to be entitled to recover the whole amount of a*

INSURANCE—(Continued).

loss by fire, notwithstanding that he owned only a part of the property insured; the remainder being owned by his father, mother, brothers and sisters, all living in the house as one family.—The words “direct loss,” as used in an insurance contract, are not intended to exclude such a claim as the plaintiff’s; they refer to the nature of the loss or damage—it must not be too remote.—*Keefer v. Phoenix Insurance Co. of Hartford* (1901), 31 S.C.R. 144, applied and followed. — The “proofs of loss” furnished by the plaintiff became the property of the defendants as soon as the letter containing them, addressed to the defendants, was posted (which was on the 8th January); that was a sufficient delivery of the proofs within the meaning of the statutory condition 18; and, therefore, the period of 60 days, allowed by statutory condition 22 for payment of the loss, had expired on the 10th March, when the action was begun, and the action was not prematurely brought.—If the conditions as to proof had not been strictly complied with, the plaintiff was entitled to relief under sec. 199 of the Ontario Insurance Act. *Maldover v. Norwich Union Fire Insurance Co.*, 532.

2. *Fire Insurance—Notice by Insurer Terminating Policy—Registered Post-letter — Tender of Unearned Portion of Premium by Enclosing Money in Letter—Letter not Received by Assured until after Fire—Statutory Conditions 11, 15 — “Thereewith.”*] — Under

INSURANCE—(Continued).

statutory condition 11 (R.S.O. 1914, ch. 183, sec. 194), a fire insurance policy may be terminated by the company by giving to the assured seven days’ notice to that effect, and, if on the cash plan, by tendering *therewith* a ratable proportion of the premium paid, for the unexpired term; and by condition 15 any written notice to the assured may be by letter delivered to him or by registered letter addressed to him at his post-office address:—*Held* (MEREDITH, C.J.O., dissenting), that a policy issued to the plaintiff by the defendants was not effectually terminated by the defendants by mailing to the plaintiff, in a registered letter addressed to her at her post-office address, a notice cancelling the policy, and by enclosing in the letter a sum said to represent the portion of the premium applicable to the unexpired part of the term. The notice, though the letter was not received by the plaintiff until after a fire had occurred, might be sufficient, but the enclosing of the money was not a proper or sufficient tender, and both notice and tender were required.—*Semble*, also, applying *Skillings v. Royal Insurance Co.* (1902-3), 4 O.L.R. 123, 6 O.L.R. 401, that the notice could be effective in terminating the policy only if and when it reached the plaintiff. *Veltre v. London and Lancashire Fire Insurance Co. Limited*, 619.

3. *Fire Insurance—Proofs of Loss—Failure of Assured to Make*

INSURANCE—(Continued).

*Statutory Declaration — Mistake — Further Proofs not Demanded—Insurance Act, R.S.O. 1914, ch. 183, sec. 194 (condition 18 (c)); sec. 199—Inequitable Result if Forfeiture Decreed—Application for Insurance—Failure to Disclose Apprehension of Incendiarism—Question in Application Left Unanswered—Disclosure by Assured to Agent of Insurance Company—Failure of Agent to Communicate to Company—Issue of Policy without Answer to Question being Insisted upon—Waiver—Unreasonable Condition in Application—Sec. 197 of Act—Liability of Company.]—In an action upon a policy of fire insurance it was held, applying sec. 199 of the Insurance Act, that it would be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with condition 18 (c), sec. 194.—The assured signed a printed application in which the amount of insurance sought was filled in, but which was otherwise in blank. At the time of signing, incendiarism was apprehended by the assured; the question in the application, "Is incendiarism threatened or apprehended?" was not answered "yes" or "no," but a horizontal line was drawn which filled up the space left for the answer:—*Held*, that this indicated that the question was not answered at all; that the danger was a circumstance material to be made known to the company in order to enable them to judge of the risk, and was not disclosed to the company by the printed application as sent to*

INSURANCE—(Continued).

the company.—The assured left F., a general agent of the company with large powers, to fill in the application and send it to the company, thus making F. his agent for that purpose. The facts creating the apprehension of incendiarism were disclosed by the assured to F. before the application was signed:—*Held*, that notice to F. was notice to the company.—The assured was responsible for the answers made in the application; but F. owed a duty to the company to disclose the material facts that had been made known to him respecting the danger; the company, receiving the application with the question unanswered on the face of it, did not send it back and insist on an answer to the question, but accepted the risk and issued a policy, thereby waiving an answer to the question in the printed application, and leaving the matter in the same situation as if the question had not been there.—Disclosure was essential, but could be effectively made *dehors* the answers in the printed form; disclosure to the agent was disclosure to the company; and any provision to the contrary in the conditions or application was in this case unreasonable and ineffective (sec. 197 of the Act).—*Sinclair v. Canadian Mutual Fire Insurance Co.* (1876), 40 U.C.R. 206, 212, and *Graham v. Ontario Mutual Insurance Co.* (1887), 14 O.R. 358, followed. *Gabel v. Howick Farmers Mutual Fire Insurance Co.*, 158.

INSURANCE—(Continued).

4. *Life Insurance—Beneficiary Confined in Hospital for Insane—Order for Payment of Insurance Moneys by Insurers to Inspector of Prisons and Public Charities—Hospitals for the Insane Act, R.S.O. 1914, ch. 295, sec. 36—Insurance Act, R.S.O. 1914, ch. 183, sec. 176—4 Geo. V. ch. 30, sec. 10.*—The provisions of sec. 36 of the Hospitals for the Insane Act override *pro tanto* those of sec. 176 (2) of the Ontario Insurance Act, as enacted by 4 Geo. V. ch. 30, sec. 10.—An order was made for payment to the Inspector of Prisons and Public Charities, instead of into Court, of insurance moneys to which an insane person, confined in a public hospital for the insane, was entitled. *Re Nash and Canadian Order of Chosen Friends*, 530.

5. *Life Insurance — Will — Change of Beneficiary—Identification of Policy—Preferred Class of Beneficiaries — Stepmother — Ontario Insurance Act, R.S.O. 1914, ch. 183, secs. 171 (5), 178—Condition in Will.*—R., whose life was insured for \$1,000 by the M. company, under a policy which provided that, in the event of his death before the 19th November, 1933, the insurance moneys were to be paid to Ruth E.R., "stepmother of the insured," was killed in action in September, 1916. After the issue of the policy he made a will in which he referred to other insurance, which he called "city insurance," meaning another policy for \$1,000 on his life, procured by

INSURANCE—(Continued).

a city corporation on his enlistment for service in the war. By the will he devised and bequeathed all his real and personal property of which he should die possessed, and then disposed of \$2,000 of insurance, in various sums, amongst eight persons; he directed that \$1,000 of the \$2,000 should go to "my mother R. E. R.;" and there was a later direction that, "in case I do not receive city insurance the above will be void and the M. Life will go to my mother:"—*Held*, that the will sufficiently identified the insurance which was payable to Ruth E. R. to make a change of the beneficiary effective: Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (5).—*Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, followed.—A "stepmother" does not come within the preferred class referred to in sec. 178 of the Act.—*McHugh v. Grand Trunk R.W. Co.* (1901), 2 O.L.R. 600, 606, applied.—The condition of the will on which the disposition of the \$2,000 insurance moneys was to become void did not become operative, the "city insurance" having been paid to Ruth E. R. *Re Rutherford*, 266.

INTEREST.

1. *Discretion of Court below—Appeal — Costs — Appeal "as to Costs only"—Judicature Act, sec. 24—County Courts Act, sec. 32—Appeal Joined with Unsuccessful Appeal as to another Matter.*—The discretion exercised by a lower Court in allowing interest

INTEREST—(Continued).

upon a money-demand ought not to be interfered with on appeal.—*Toronto R. W. Co. v. Toronto Corporation*, [1906] A.C. 117, followed.—An appellant cannot, by joining with an appeal as to costs, an appeal as to other parts of the judgment, in which he fails, escape from the effect of sec. 24 of the Judicature Act, R.S.O. 1914, ch. 56, which section is, by sec. 32 of the County Courts Act, R.S.O. 1914, ch. 59, applicable to County and District Courts, and by which an order "as to costs only which by law are left to the discretion of the Court" cannot be appealed against except by leave of the Court or Judge making the order. *Buckley v. Vair*, 465.

2. *Promissory Notes*—"Money-lenders"—*Harsh and Unconscionable Transactions—Ontario Money-Lenders Act—Findings of Trial Judge—Reversal on Appeal.*]—The judgment of CLUTE, J., 39 O.L.R. 440, was reversed on the ground that the plaintiffs were not money-lenders within the meaning of the Ontario Money-Lenders Act, R.S.O. 1914, ch. 175, and that the transactions were not harsh and unconscionable.—*McCabe v. Jeffrey* (1917), reported in the footnote, *infra*, followed. *Shaw v. Hossack*, 475.

See MORTGAGE, 1.

INTERIM INJUNCTION.

See INJUNCTION.

INTOXICATING LIQUORS.

See ONTARIO TEMPERANCE ACT.

INVITATION.

See NEGLIGENCE, 4—STREET RAILWAY.

JUDGE.

See ASSESSMENT AND TAXES, 3.

JUDGMENT.

See APPEAL, 2—CONTEMPT OF COURT — PLEADING — VEXATIOUS PROCEEDINGS.

JURISDICTION.

See APPEAL, 1—BANKS AND BANKING — CRIMINAL LAW, 1, 2 — FINES AND PENALTIES — LUNATIC — ONTARIO TEMPERANCE ACT—RAILWAY, 2—WRIT OF SUMMONS.

JURY.

See MOTOR VEHICLES ACT— NEGLIGENCE, 1, 3, 4—STREET Railway, 1, 2—TRIAL.

JUVENILE COURT.

See CRIMINAL LAW, 1.

LAND.

See DITCHES AND WATER-COURSES ACT — EASEMENT — GIFT — MUNICIPAL CORPORATIONS — RAILWAY, 2 — TRUSTS AND TRUSTEES, 1—VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. *Assignment by Tenant for Benefit of Creditors—Landlord's Preferential Lien for Rent—Landlord and Tenant Act, sec. 38—Period Covered by Lien—Rent in Arrear—"Execution of the Assignment"—"Execution" Including Delivery—Fraction of Day.*]—In sec. 38 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155,

LANDLORD & T.—(Continued).

providing that in case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent during the period of one year next preceding and for three months following the "execution of the assignment," the words quoted are used in their strict legal sense, and mean the completion of the deed of assignment by delivery as well as by signing and sealing.—Where a deed of assignment was signed and sealed by the assignor on the day on which a month's rent in advance was due, but was not completed nor intended to be completed by delivery to the assignee until the following day, and was not actually completed until the day next after that, it was *held* (the month's rent not having been paid), that rent was in arrear at the first moment of time of the day after the gale-day; and, there never having been any intention that the deed should be handed to the assignee until after the commencement of business on that day, there were arrears when the deed was "executed," and the landlord was entitled to a preferential lien for four months' rent; the rule as to disregarding fractions of a day having no application in such a case. *Re Metropolitan Theatres Limited, Magee Real Estate Co. Limited's Claim*, 345.

2. *Landlord and Tenant Act, Part III.—Overholding Tenants—Summary Ejectment—Powers of*

LANDLORD & T.—(Continued)

County Court Judge—Mortgagee and Mortgagor—"Person Entitled to Possession"—"Occupant"—Sec. 2 (b) and (d) of Act—"May"—Interpretation Act, sec. 29 (s).]—"The person giving or permitting the occupation of the premises" or "the person entitled to possession of the premises," included in the definition of "landlord" in sec. 2 (b) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, as applied to proceedings under the "Overholding Tenants" provisions of the Act (Part III., secs. 75 *et seq.*), must be some one of the character of a "landlord," and the "occupant" (sec. 2 (d)) must be some one of the character of a tenant.—A County Court Judge has no power, under Part III. of the Act, to make a summary order for the issue of a writ of possession, at the instance of one whose only claim to possession is as one of several mortgagees, against the mortgagor in possession. *Re Mitchell and Fraser*, 389.

3. *Lease of House—Injury to Premises by Acts and Omissions of Tenant—Liability in Damages—Negligence.*—Where the defendant, the tenant of the plaintiff's house, knew that damage from frost was likely to happen if precaution were not taken to prevent the water which he had brought into the house by pipes from freezing, and failed to take reasonable precaution to that end, but, on the contrary, did that which increased the danger and led to the freezing of the

LANDLORD & T.—(Continued).

water and consequent injury to the demised premises, he was held liable to the landlord in damages for such injury.—This liability was not based upon negligence; but *semble*, if it were necessary to prove negligence, it had been proved.—The proposition stated in Wood's Landlord and Tenant, 2nd ed., para. 422, approved.—*Sticklehorne v. Hatchman* (1586), Owen 43, *Holden v. Liverpool New Gas Co.* (1846), 3 C.B. 1, 5, and *Steggles v. New River Co.* (1863), 11 W.R. 234, applied. *Conklin v. Dickson*, 460.

See **FIXTURES — LIMITATION OF ACTIONS.**

LANE.

See **WAY.**

LEASE.

See **LANDLORD AND TENANT**, 3.

LEAVE AND LICENSE.

See **NEGLIGENCE**, 4.

LEAVE TO PROCEED.

See **VEXATIOUS PROCEEDINGS.**

LICENSE.

See **CONSTITUTIONAL LAW**, 2
—**FIXTURES.**

LIEN.

See **LANDLORD AND TENANT**, 1.

LIFE INSURANCE.

See **INSURANCE**, 4, 5.

LIMITATION OF ACTIONS.

Mineral Lands—Reservation in Deed — Estoppel — Tenancy — Payment of Taxes—Further Evi-

LIMIT. OF AC.—(Continued).

dence Given on Appeal.—The judgment of a Divisional Court of the High Court, *Dodge v. Smith* (1902), 3 O.L.R. 305, reversed. *Dodge v. Smith*, 362.

See **CONTRACT**, 1—**TRUSTS AND TRUSTEES—WAY.**

LIQUOR.

See **ONTARIO TEMPERANCE ACT.**

LOCAL BOARD OF HEALTH.

See **NEGLIGENCE**, 1,

LOST GRANT.

See **WAY.**

LUNATIC.

Person Incompetent to Manage his Estate—Lunacy Act, sec. 37—Appointment of Guardian—Authority to Continue Subscriptions to Charitable and Philanthropic Schemes—Jurisdiction of Court—Sec. 12 of Act.—The Court has, under sec. 12 of the Lunacy Act, R.S.O. 1914, ch. 68, wide powers for the management and administration of the estate of a lunatic or person declared incompetent under sec. 37, "for the maintenance or benefit of the lunatic or of his family;" and these words ought to be construed liberally; but, where what is sought is the disbursement of large amounts for the benefit of schemes and projects which, though charitable and philanthropic and worthy of support, cannot be regarded as falling within these words, the sanction of the Court cannot be given.—In England the jurisdiction in lunacy is not limited by statute as in Ontario, and no

LUNATIC—(Continued).

English case goes far enough to warrant the granting of what was sought in this case—authority to the guardians of a person declared incompetent under sec. 37, to pay, out of his estate, sums for the support of charitable and philanthropic schemes the same or similar to those which he had liberally supported when competent. *Re D.*, 365.

See INSURANCE, 4.

MAGISTRATE.

See CRIMINAL LAW—ONTARIO TEMPERANCE ACT.

MAINTENANCE.

See BASTARD.

MARRIAGE.

See TRIAL.

MASTER AND SERVANT.

See NEGLIGENCE, 2.

MASTER IN CHAMBERS.

See FINES AND PENALTIES.

MEDICAL OFFICER OF HEALTH.

See NEGLIGENCE, 1.

MEDICATION.

See ONTARIO TEMPERANCE ACT, 1, 6.

MINERAL LANDS.

See LIMITATION OF ACTIONS.

MINERALS.

See RAILWAY, 2.

MISDIRECTION.

See MOTOR VEHICLES ACT.

MISTAKE.

See INSURANCE, 3—TRUSTS AND TRUSTEES, 2.

MONEY-LENDERS.

See INTEREST, 2.

MORTGAGE.

1. *Action for Foreclosure—Mortgage Made in 1915—Renewal or Extension of Mortgage Made in 1911—Interest and Taxes not in Arrear—Principal Overdue—Mortgagors and Purchasers Relief Act, 1915, sec. 2 (1)—Sec. 4, as Amended by 6 Geo. V. ch. 27, sec. 1—Action Begun without Leave—Dismissal—Refusal to Grant Leave nunc pro tunc—Discretion.* —Upon the evidence, it was held, that a certain mortgage made in 1915, though in form a new mortgage, was in fact an extension or renewal of a mortgage upon the same land, made in 1911, between different parties; and, being made for a term of less than three years, and at a higher rate of interest than that stipulated for in the original mortgage, it was not covered by the exception contained in sec. 4 of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, as amended in 1916 by 6 Geo. V. ch. 27, sec. 1; and the mortgagee was, therefore, subject to the condition imposed by sec. 2 (1) of the original Act, taxes and interest not being in arrear, of obtaining the leave of a Judge before beginning an action to enforce the mortgage. — And, where leave had not been obtained before an action for foreclosure was begun, the action was summarily dismissed by a

MORTGAGE—(Continued).

Judge, who also refused to grant the leave *nunc pro tunc*, deeming that it was not a case in which he should exercise a discretion in favour of the mortgagee. *Appelbe v. Windsor Security Co. of Canada Limited*, 548.

2. *Power of Sale—Exercise of—Purchase by Second Mortgagee—Action to Set aside Sale—Notice of Sale actually Served but not on all Persons Interested—Right of Mortgagee to Stand on Provision for Sale without Notice—Abortive Auction-sale—Test of Value—Advertisement of Sale—Two Parcels Offered together—Bona Fides of Actual Sale—Evidence—Value of Land—Expert Testimony.*]—In an action by the assignee of the equity of redemption to set aside a sale of vacant land under the power of sale contained in the first mortgage, by the first mortgagee to the second mortgagee, it was held:—(1) That the right to sell, on three months' default, without notice, as stipulated for in the mortgage, was not lost by notice being given to some of those entitled to notice under an earlier provision in the mortgage by which the power of sale might be exercised after default for two months on 10 days' notice.—(2) That, when the land, which consisted of two separated parcels, was offered for sale at public auction, each parcel should have been advertised and offered separately, instead of both together.—(3) That, upon the evidence, the sale to the second mortgagee, by private contract, after the land had been offered at public

MORTGAGE—(Continued).

auction, was a real sale, and free from any taint or suspicion of wrongdoing.—(4) That, considering all the circumstances, the sale at \$350 a foot was not a sale at an undervalue, though there was expert evidence that the land was worth \$400 a foot.—Remarks upon the weight of expert testimony as to the value of land. *Uren v. Confederation Life Association*, 536.

See ASSIGNMENTS AND PREFERENCES, 1, 2—BANKS AND BANKING—LANDLORD AND TENANT, 2.

MORTGAGORS AND PURCHASERS RELIEF ACT.

See MORTGAGE, 1.

MORTMAIN AND CHARITABLE USES ACT.

See CONSTITUTIONAL LAW, 2—WILL, 2.

MOTOR VEHICLES.

See MOTOR VEHICLES ACT—NEGLIGENCE, 3—ONTARIO TEMPERANCE ACT, 2.

MOTOR VEHICLES ACT.

Motor Vehicle on Highway—Loss or Damage to Person Driving Horses—R.S.O. 1914, ch. 207, sec. 16 (1)—Construction of—Speed of Motor Vehicle when Approaching Horses—Knowledge of Approach of Horses—Reasonable Belief—Verdict of Jury—Judge's Charge—Misdirection—New Trial—Negligence—Onus—Sec. 23 of Act—Contributory Negligence.]—By sec. 16 (1) of the Motor Vehicles Act, R.S.O. 1914, ch. 207, a person having the con-

MOTOR VE. ACT.—(Continued).

trol or charge of a motor vehicle, outside the limits of any city or town, shall not approach a horse drawing a vehicle, or upon which any person is riding, "within 100 yards, or pass the same going in an opposite direction, at a greater speed than 7 miles an hour."—*Held*, in an action for damages for injury and loss sustained by the plaintiff by reason of his horses being frightened by the defendant's motor vehicle, upon a public highway, in which it was admitted that the defendant was driving at a rate of speed greater than 7 miles an hour when he approached within 100 yards of the plaintiff, that the trial Judge had misdirected the jury, who found a general verdict for the defendant, in telling them that sec. 16 (1) requires the motor vehicle to be at no greater speed than 7 miles an hour, only if the operator has reason to believe that he is approaching a horse, and that the restriction does not apply if he has no reason so to believe; and a new trial was directed (MEREDITH, C.J.C.P., dissenting).—*Per MEREDITH, C.J.C.P.*:—Section 16 (1) applies to the ordinary case of drivers approaching and seeing each other—not to the case of one who does not see.—*Per RIDDELL and ROSE, JJ.*:—Section 23 of the Act does no more than shift the onus of proof: it is open to the defendant, notwithstanding the provisions of the section, to shew negligence or contributory negligence on the part of the plaintiff. *Bradshaw v. Conlin*, 494.

MUNICIPAL CORPORATIONS.

Expropriation of Land for Widening Highways — By-law — Award of Compensation to Landowner—Repeal of By-law after Award—Right of Corporation to Desist—Municipal Act, sec. 347 —Municipal Arbitrations Act, sec. 7—Effect as to Right of Desistment—Declaration in Expropriating By-law that Lands Form Part of Highways — Professed Authorisation of Use of Lands before Award—Conditions of sec. 347 — Absence of Finding in Award that By-law not Acted upon —Refusal to Refer back Award for Amendment—Enforcement of Award.]—A motion by landowners to enforce an award of compensation for lands expropriated by a city corporation for the purpose of widening certain highways, was resisted by the corporation on the ground that the expropriating by-law had been repealed, and that the corporation had legally desisted, pursuant to the provisions of the Municipal Act, R.S.O. 1914, ch. 192, sec. 347:—*Held*, that, in construing the provisions of sec. 7 of the Municipal Arbitrations Act, R.S.O. 1914, ch. 199, regard must be had to the purport of the whole Act; that that Act relates solely to the ascertainment of the *quantum* of compensation to which a claimant is entitled; and that sec. 7 must be construed as meaning that no appeal shall lie against the award unless the appeal is brought within six weeks, and not as declaring that, unless an appeal is so brought, the right of desistment lapses.

MUN. CORPS.—(Continued).

—But the expropriating by-law, which declared that the lands expropriated formed part of the highways, professed to authorise the use of the lands for the purpose of a highway, before the award; therefore the corporation had failed to bring itself within the conditions prescribed by sec. 347 of the Municipal Act (as amended by sec. 6 of 7 Geo. V. ch. 42); and the award was binding on the corporation and should be enforced.—The award should not be referred back to the arbitrator to be amended by adding a finding that the by-law had not been acted on. The claimants were, from the time the award was made, entitled to rely on the fact that the situation did not fall within the provisions of sec. 347. *Re City of Toronto and Grosvenor Street Presbyterian Church Trustees*, 550.

See ASSESSMENT AND TAXES—
DITCHES AND WATERCOURSES
ACT.

NEGLECTED CHILD.

See CRIMINAL LAW, 1.

NEGLIGENCE.

1. *Local Board of Health—Medical Officer of Health—Death of Diphtheria Patient—Action under Fatal Accidents Act—Evidence—Findings of Jury—Absence of Causal Relation between Negligence and Death—Public Health Act, R.S.O. 1914, ch. 218, sec. 58—Effect of—Infectious Diseases—Public Safety—Duty of Health Authorities—Actionable Breach.*
—There being no evidence that

NEGLIGENCE.—(Continued).

the death of the plaintiffs' infant daughter, a diphtheria patient, was the result of the negligence of the defendants, the Local Board of Health and Medical Officer of Health of a city, the judgment of BRITTON, J., the trial Judge, dismissing the action, notwithstanding the finding of the jury that the death was caused by negligence of the defendants, was affirmed.—The child was apparently recovering from diphtheria when paralysis of the heart intervened and caused her death.—The causal relation between the alleged negligence and the death must be made out by evidence, and not left to the conjecture of the jury.—The main purpose of sec. 58 of the Public Health Act, R.S.O. 1914, ch. 218, is the protection of the public against the spread of contagious and infectious diseases; and *quære*, whether that enactment imposed upon the defendants a duty to the patient for a breach of which an action would lie. *Simpson v Local Board of Health of Belleville*, 406.

2. *Setting out Fire in Highway—Failure to Extinguish—Injury to Neighbouring Property—Liability of Foreman of Gang of Men Engaged in Work for Crown—Fire actually Set by Subordinate Member of Gang—Authority of Foreman—Liability—Fellow-servants of Crown—Respondent Superior—Relationship of Master and Servant—Negligent Act not Done in Service of Crown—Evidence.*—The defendant was the

NEGLIGENCE.—(Continued).

foreman of a gang of workmen engaged in building a road for the Government of Ontario, in the northern part of the Province. The workmen boarded and lodged themselves. A fire was lighted in the roadway upon a day in July, in dry weather, by one of the gang, the "water-boy," for the purpose of making tea for all of them. The fire spread and destroyed property of the plaintiff upon land adjoining the roadway:—*Held*, assuming that the setting out of the fire was not an unlawful act, that the failure to extinguish it was negligence, and, upon the evidence, was the cause of the plaintiff's loss.—(2) That the defendant was liable although he was away from his work on the day when the fire that caused the mischief was lighted: it was the custom of the men to light a fire each day; it was from the defendant alone that the boy who lighted the fires got his authority to do so; and there was nothing in the evidence to shew that the defendant gave any orders or warning to the men to extinguish the fire after it had answered its purpose.—(3) That in making the road the workmen were servants of the Crown, but not in making the fire, which was for their own benefit and their own act.—*Per RIDDELL, J.* (dissenting):—The relation of the defendant and the boy was not that of master and servant; they were equally servants of the Crown; and, as between them, the maxim *respondeat superior* had no application.—*Feather v.*

NEGLIGENCE.—(Continued).

The Queen (1865), 6 B. & S. 257, and *Hiscox v. Lander* (1876), 24 Gr. 250, 266, referred to. *Bigras v. Tasse*, 415.

3. *Street Railway—Collision of Street-car with Automobile—Negligence of Motorman—Negligence of Chauffeur—Findings of Jury—Evidence—Contributory Negligence—Ultimate Negligence—New Trial.*—In an action for damages for injury to the plaintiff's automobile, which was struck by a street-car of the defendant company when the plaintiff's chauffeur was attempting to cross a street in front of the approaching car, it was *held*, upon the evidence, that the finding of the jury at the trial that the chauffeur was not guilty of any negligence in operating the automobile which caused or contributed to the accident, could not be supported and must be set aside.—And, the attention of the jury not having been directed to the question whether, but for the negligence of the defendant company's motorman, the accident might have been avoided, notwithstanding the negligence of the chauffeur, and their findings in favour of the plaintiff not being conclusive of that question, a new trial was directed.—The negligence spoken of as ultimate negligence may be established either by an act occurring after the effect of the contributory negligence has been spent and the crisis has supervened, or by a condition created negligently prior to the emergency, but still operating so as to prevent any

NEGLIGENCE—(Continued).

immediate act from being effective.—The practice of leaving to the jury the question whether, if both parties were guilty of negligence, the defendant could have done anything which would have prevented the accident, should be followed in every instance where contributory negligence is alleged, unless the facts clearly exclude any inference of ultimate negligence.—*Loach v. British Columbia Electric R.W. Co.*, [1916] 1 A.C. 719, explained and followed. *Ontario Hughes-Owens Limited v. Ottawa Electric R.W. Co.*, 614.

4. *Unsafe Premises—Injury to Person Going there on Lawful Business—Invitation—Leave—Evidence—Cause of Action—Findings of Jury.*]—The plaintiff came with a waggon to the defendants' factory to get a pair of scales which he had ordered. In the archway leading from the highway to the factory, a notice was displayed: "Positively no admittance to the factory; apply at office." The plaintiff said that he did not see the notice; he, however, went to the office, and was there directed by a person in charge to drive into the yard and go to the platform in front of the shipping-room, where the scales would be brought out; he drove into the yard, but not up to the platform; after waiting for some time, no one appearing with the scales, he essayed to go upon the platform with the object of entering the shipping-room, the door of which, giving upon the plat-

NEGLIGENCE—(Continued).

form, was open. There were no regular steps by which to ascend the platform, but some loose blocks had been placed so as to afford a means of mounting; the plaintiff stepped upon these, they gave way, he fell, and was injured. In an action brought to recover damages for the injury, the jury found that there was negligence on the part of the defendants "for not having proper steps or no steps at all," that the cause of the plaintiff's injury was his fall on the defendants' premises; that there was an invitation to him to use the blocks, "being as there was no other way to get upon the platform;" that the purpose of the invitation was to receive goods ordered; they also found against contributory negligence, and declared that the plaintiff was "justified in doing as he did do:"—*Held* (MAGEE, J.A., and LENNOX, J., dissenting), that the plaintiff had failed to prove any cause of action; there was no evidence to support the jury's findings, and the action must be dismissed.—Review of the authorities. *Struthers v. Burrow*, 1.

See LANDLORD AND TENANT, 3
—MOTOR VEHICLES ACT—RAILWAY, 1 — SHERIFF — STREET RAILWAY.

NEW TRIAL.

See MOTOR VEHICLES ACT—NEGLIGENCE, 3 — PARTIES — TRIAL.

NOMINAL DAMAGES.

See FIXTURES.

NOTICE.

See DITCHES AND WATER-COURSES ACT, 1—EASEMENT—INSURANCE, 2.

NOTICE OF SALE.

See MORTGAGE, 2.

ONTARIO TEMPERANCE ACT.

1. *Magistrate's Conviction for Keeping Intoxicating Liquor for Sale—"Wine" Containing Large Percentage of Proof Spirits Found in Warehouse of Wholesale Grocer—Secs. 2 (f) and 88 of Act—Evidence of Fitness for Use and Actual Use as Beverage with Resulting Intoxication—Admissibility—Permissive Clause, sec. 125—Application of—Absence of Medication—Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. (D.) ch. 56—Effect as Regards Ontario Act—6 & 7 Geo. V. ch. 19, sec. 4D—7 & 8 Geo. V. (D.) ch. 30, sec. 2.]*—The defendant, a wholesale grocer, upon prosecution before a magistrate for keeping intoxicating liquor for sale contrary to the Ontario Temperance Act, 6 Geo. V. ch. 50, was proved to have had in his possession, at his warehouse, a quantity of "Hall's wine," which, on analysis, was found to contain 31.33 per cent. of proof spirits:—*Held*, upon a motion to quash his conviction, that the wine must be "conclusively deemed to be intoxicating" (sec. 2 (f) of the Act); and the defendant was liable to be convicted unless he proved that he did not commit the offence charged (sec. 88); but evidence given on behalf of the prosecu-

ONT. T. ACT—(Continued).

tor to shew that the wine was capable of being used and was used as a beverage, and that its use resulted in intoxication, was not inadmissible: it went to confirm the statutory presumption that the wine was intoxicating and to negative the suggestion that the wine was so medicated as to prevent its use as an alcoholic beverage.—*Held*, also, that the wine did not come within the requirements of sec. 125, nor did the defendant.—*Held*, also, that the Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. ch. 56, is not to be taken to be *in pari materiâ* with the Ontario Temperance Act; nor, by the importation of sec. 7 of the Dominion Act, is the Ontario Act to be read as exempting from its operation all proprietary medicines duly registered.—Differences between the two Acts pointed out and their meaning and scope defined.—The Dominion statute 7 & 8 Geo. V. ch. 30, sec. 2, adding sec. 4D to 6 & 7 Geo. V. ch. 19, referred to. *Rex v. Axler*, 304.

2. *Magistrate's Conviction for Offence against sec. 41—Having Liquor in Motor-car—Depositions not Read over to and Signed by Witnesses—Sec. 74—Absence of Prejudice—Carrying Liquor from one Lawful Place to another—Sec. 43—Evidence—Onus—Sec. 88—Proof of Offence—Finding of Magistrate.]*—Upon a motion to quash a conviction of the defendant, by a magistrate, for unlawfully having intoxicating liquor in her possession, elsewhere than

ONT. T. ACT—(Continued).

in her private dwelling-house—she had a bottle of gin in her motor-car—contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50:—*Held*, that failure on the part of the magistrate to comply with sec. 74 of the Act, by causing the depositions of the witnesses to be read over to and signed by them, did not invalidate the conviction, at all events unless it was shewn that the defendant was in some way prejudiced thereby. — *Rex v. Leach* (1908), 17 O.L.R. 643, *Rex McDevitt* (1917), 39 O.L.R. 138, and *Montreal Street R. W. Co. v. Normandin*, [1917] A.C. 170, followed.—(2) It was objected that no offence was proved. But the defendant had in her possession the liquor in respect of which she was prosecuted, and it was for her to prove that she did not commit the offence with which she was charged: sec. 88. The defence was that the defendant was carrying the liquor from one place where she might lawfully have it to another such place, and that no use had been made of it *en route*: sec. 43 (amended by 7 Geo. V. ch. 50, sec. 14). If the magistrate did not believe the defendant's statement (which was not shewn), that was the end of the case (*Rex v. Le Clair* (1917), 39 O.L.R. 436); it could not be assumed that he did believe the statement but proceeded upon a view of the effect of sec. 43 different from that put forward by the defendant. *Rex v. Tugman*, 349.

3. Magistrate's ^TConviction for Offence against sec. 41—Jurisdic-

ONT. T. ACT—(Continued).

tion—Unlawfully Having Intoxicating Liquor—"Indian"—Evidence—Indian Act, R.S.C. 1906, ch. 81, secs. 2(f) (i.), 137—Affidavits Supplementing Evidence before Magistrate—Inadmissibility—Sentence—"Hard Labour"—Interpretation Act, R.S.O. 1914, ch. 1, sec. 25—Distress—Amendment—Criminal Code, sec. 889—Absence of Written Information—Place of Offence.]—The defendant, having been convicted by a magistrate for unlawfully having intoxicating liquor in his possession, contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, was imprisoned under a warrant of commitment issued pursuant to the conviction; and a motion having been made for his discharge, upon the return of a *habeas corpus*, it was held:—(1) That the mere statement of the defendant to the magistrate that he was an Indian, and therefore, as he attempted to shew, not subject to the Ontario Act, did not go far enough—it was incumbent upon him (if he was to have the benefit of the Indian Act, R.S.C. 1906, ch. 81, sec. 137) to prove that he was a male person of Indian blood reputed to belong to a particular band (sec. 2(f) (i.) of that Act); and an affidavit supplementing the evidence given before the magistrate was not admissible.—(2) That a sentence of imprisonment with hard labour may be imposed upon a conviction for an offence against the Ontario Temperance Act: Interpretation Act, R.S.O. 1914, ch. 1, sec. 25.—(3) That the warrant of commitment and the

ONT. T. ACT—(Continued).

conviction could, under sec. 889 of the Criminal Code, be amended to meet the objection that it was only in default of sufficient distress that the defendant was to be imprisoned, and that no distress-warrant was issued.—(4) That the objection that there was no written information or complaint could not prevail, not having been taken before the magistrate.—(5) That the place of the offence was sufficiently stated in the conviction as “at and in the city of H.” *Rex v. Martin*, 270.

4. *Magistrate's Conviction for Offence against sec. 41—Tenant of Suite of Rooms in Apartment-house—Intoxicating Liquor Kept in Cellar of House—Use of Separate Compartment — “Private Dwelling-house”*—6 Geo. V. ch. 50, sec. 41 (1).—The defendant, the occupant of a suite of rooms in an apartment-house, kept in a compartment in the cellar under the house, of which compartment he had the sole use and occupation, but which did not form part of the suite in which he lived, a stock of intoxicating liquors:—*Held*, that the compartment in the cellar should be regarded as part of “the private dwelling-house” in which the defendant resided; and a magistrate’s conviction for an offence against sec. 41(1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, was quashed. *Rex v. Obernesser*, 264.

5. *Magistrate's Conviction for Unlawful Sale of Intoxicating Liquor*—6 Geo. V. ch. 50, sec. 40

ONT. T. ACT—(Continued).

—*Evidence — Sufficiency — Testimony of Police Officers as to Complaints — Inadmissibility — Effect on Mind of Magistrate — Testimony of Witness not Interpreted into Language of Defendant — Absence of Prejudice — Liquor Found on Premises — Presumption — Absence of Search-warrant — Finding of Magistrate.*].—Upon a motion to quash a magistrate’s conviction of the defendant for selling intoxicating liquor, contrary to sec. 40 of the Ontario Temperance Act, 6 Geo. V. ch. 50:—*Held*, that there was evidence before the magistrate sufficient to justify the conviction.—(2) That, although evidence that complaints were made to the police to the effect that intoxicating liquor was being sold in the defendant’s house was improperly admitted, it would not be fair to say that the inadmissible statements might have had some influence upon the magistrate’s decision; for the evidence as to the alleged sale was conclusive, if believed, and no credible explanation was given of the presence in the defendant’s house of a large quantity of intoxicating liquor.—(3) That there is no rigid rule that in every case all the evidence shall be made intelligible to the accused.—(4) That there was no ground for the objection that the finding of liquor upon the premises raised no presumption against the accused because the police officers who found it had no search-warrant and no authority to enter the house *Rex v. Grassi*, 359.

ONT. T. ACT—(Continued).

6. *Magistrate's Conviction of Druggist for Keeping Liquor for Sale without License*—6 Geo. V. ch. 50, sec. 40—*Dominion Proprietary or Patent Medicine Act*, 7 & 8 Edw. VII. ch. 56—*Powers of Provincial Legislature—Separate Fields of Legislation—License to Carry on Trade in Canada—Medicated Compound Containing Large Percentage of Proof Spirits—Use as Beverage—Evidence—Findings of Magistrate—Secs. 85, 88, 124, 125 129, 131 of Temperance Act—Motion to Quash Conviction—Preliminary Objection—Right of Appeal under sec. 92 (2)—Right to Certiorari Taken away—Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10 (3).*—The Ontario Temperance Act, 6 Geo. V. ch. 50, and the Proprietary or Patent Medicine Act of Canada, 7 & 8 Edw. VII. ch. 56, do not enter upon the same field of legislation.—The Dominion statute 7 & 8 Geo. V. ch. 30, sec. 2, adding sec. 4D to the Act 6 & 7 Geo. V. ch. 19, and *Rex v. Azler* (1917), 40 O.L.R. 304, referred to.—The defendant company carried on business as a chemist and druggist, and was also licensed under the Dominion Act. For exposing or keeping for sale intoxicating liquor without first having obtained a license under the Ontario Temperance Act, contrary to sec. 40, the defendant company was convicted by a magistrate. The "liquor" was an "invalid port wine," which contained 35.22 per cent. of proof spirits. There was evidence before the magistrate of the use of

ONT. T. ACT—(Continued).

the wine as a beverage:—*Held*, that the defendant company was not authorised by the Dominion Act to carry on the sale of this article throughout Canada in contravention of provincial prohibitory legislation.—There being evidence before the magistrate from which he could draw the inference that the wine did not contain "sufficient medication to prevent its use as an alcoholic beverage" (sec. 129 of the Ontario Temperance Act, as amended by 7 Geo. V. ch. 50, sec. 44), his finding could not be interfered with upon a motion to quash the conviction.—While the magistrate might well have found that sec. 131 of the Ontario Temperance Act, as amended by 7 Geo. V. ch. 50, sec. 46, applied to the defendant company's case, yet, having regard to secs. 85 and 88—and the evidence not having satisfied the magistrate that the defendant company could not with reasonable diligence have obtained knowledge of the fact that secs. 124 and 125 had not been complied with—the magistrate's finding could not be interfered with upon a motion to quash the conviction.—*Rex v. Le Clair* (1917), 39 O.L.R. 436, followed.—A preliminary objection raised on behalf of the magistrate,—that under sec. 92 (2) of the Ontario Temperance Act an appeal from the conviction lay to a County Court Judge, and that sec. 10 (3) of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, applied so as to preclude the defendant company from

ONT. T. ACT—(Continued).

moving as upon *certiorari* to quash the conviction—was fatal to the application.—*Rex v. St. Pierre* (1902), 4 O.L.R. 76, *Rex v. Cook* (1908), 18 O.L.R. 415, *Rex v. Renaud* (1909), 18 O.L.R. 420, 423, *Rex v. Cantin* (1917), 39 O.L.R. 20, 22, and *Rex v. Chappus* (1917), 39 O.L.R. 329, 331, followed. *Rex v. Warne Drug Co. Limited*, 469.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See ASSESSMENT AND TAXES, 1.

OVERHOLDING TENANTS.

See LANDLORD AND TENANT, 2.

PARAMOUR.

See CRIMINAL LAW, 1.

PARENT AND CHILD.

See GIFT.

PARTIES.

Contract for Supply of Natural Gas—Injunction—Addition of Sub-purchaser as Party—Necessary Party—Rule 134—New Trial.—Upon the hearing of appeals by both parties from the judgment of LENNOX, J., 38 O.L.R. 488, attention was called to the fact that the Dominion Sugar Company was not a party to the action, although its contract with the de endants was attacked by the plaintiffs. After consideration, the Court directed a new trial, with liberty to the plaintiffs to add the sugar company as a party defendant; and it was held, that the action was not properly constituted; that the case came within Rule 134,

PARTIES—(Continued).

for, without the presence of the sugar company, it was impossible to say that the Court could effectively and completely adjudicate upon the questions involved in the action, and if the sugar company was not added the Court would be prevented from effectively doing justice.—Review of the authorities. *Hartlepool Gas and Water Co. v. West Hartlepool Harbour and R.W. Co.* (1885), 12 L.T.R. 366, followed. *Union Natural Gas v. Chatham Gas Co.*, 148.

See ASSIGNMENTS AND PREFERENCES, 1—CONTRACT, 3—COSTS.

PASSENGER.

See STREET RAILWAY.

PAYMENT.

See CONTRACT, 1.

PAYMENT INTO COURT.

See ALIEN ENEMY.

PENALTIES.

See FINES AND PENALTIES.

PERPETUITIES.

See WILL, 2.

PLEADING.

Statement of Claim—Motion to Strike out, as Disclosing no Reasonable Cause of Action—Rule 124—Prayer for Declaratory Judgment—Judicature Act, sec. 16 (b)—Question of General Importance—Rule 145—Defective Pleading—Rule 138—Direction to Deliver Better Pleading.—An action is not open to objection on the ground that a merely declara-

PLEADING—(Continued).

tory judgment is sought: Judiciary Act, R.S.O. 1914, ch. 56, sec. 16 (b).—Rule 124 (English Order XXV., r. 1) is not intended to apply to any pleading which raises a question of general importance or a serious question of law.—*Dyson v. Attorney-General*, [1911] 1 K.B. 410, [1912] 1 Ch. 158, followed.—The summary procedure under Rule 124 can be adopted only when it can be clearly seen that the claim is, on the face of it, clearly unsustainable. — *Attorney-General v. London and North Western R.W. Co.*, [1892] 3 Ch. 274, 277, and *Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited*, [1899] 1 Q.B. 86, followed.—Rule 145 requires that a statement of claim shall state specifically the relief claimed; and, where a declaration is claimed, the pleading should also state what action or contention on the part of the defendants has made it necessary to ask for a specific declaration. That “doubts have arisen” is not a sufficient reason for asking the Court to make a declaration.—The pleading, though defective, was not struck out; and an order was made, under Rule 138, for the delivery of a further and better statement of the nature of the claim. *Electrical Development Co. of Ontario Limited v. Commissioners for Queen Victoria Niagara Falls Park*, 480.

See COVENANT.

POLICE MAGISTRATE.

See CRIMINAL LAW, 2, 3—
ONTARIO TEMPERANCE ACT.

POWER COMPANY.

See EASEMENT.

POWER OF SALE.

See MORTGAGE, 2.

PRACTICE.

See ALIEN ENEMY — APPEAL — ATTACHMENT OF DEBTS — CONTEMPT OF COURT—COSTS—EVIDENCE—INTEREST, 1—PARTIES — PLEADING — VEXATIOUS PROCEEDINGS—WRIT OF SUMMONS.

PREFERENCE.

See ASSIGNMENTS AND PREFERENCES—COMPANY.

PREFERENTIAL LIEN.

See LANDLORD AND TENANT, 1.

PRESCRIPTION.

See WAY.

PRESUMPTION.

See GIFT—ONTARIO TEMPERANCE ACT, 5—WILL, 2.

PRINCIPAL AND AGENT.

See CONTRACT, 1—INSURANCE, 3.

PRINCIPAL AND SURETY.

See ASSIGNMENTS AND PREFERENCES, 2.

PRIVILEGE.

See FIXTURES.

PROMISSORY NOTE.

Death of Payee on Date of Maturity—Dishonour—Renewal by Note in Favour of Husband of Payee—Delivery up of Original Note—Action on Renewal by Endorsee of Husband after Maturity and Dishonour—Title to Note—

PROM. NOTE—(Continued).

Consideration—Fraud—Right to Transfer Note—Bills of Exchange Act, sec. 138—Equities—Disposition of Original Note.]—The plaintiff sued upon a promissory note made by the defendant, and endorsed to the plaintiff after maturity. The note was payable to D., and was a renewal of an earlier note made by the defendant in favour of D.'s wife, who died on the date of its maturity. This note was then in a bank, where it had been deposited for collection. It did not appear in what manner D. obtained possession of it; but he brought it to the defendant, some days after its maturity; she then made the new note in renewal of it, and he gave her the old note:—*Held* (MAGEE and FERGUSON, J.J.A., dissenting), that the proper inference from the evidence was, that the bank held the first note up to the date of its maturity in trust for Mrs. D., and, after her death, for her estate, in the absence of further instructions from her; and, as D. obtained possession of the note only after its maturity and dishonour, he took it subject to the same trust, and so had only a defective title.—D.'s title was not improved by obtaining the new note: the same defence may be set up to a renewal as to the original note.—The giving up of the first note was not a valid consideration for the renewal as it did not release the defendant from liability to the estate of Mrs. D.—The plaintiff, who acquired the note sued on after

PROM. NOTE—(Continued).

maturity and dishonour, stood in no better position than D.—The note was, in the hands of the plaintiff, subject to the further equity that it was obtained by fraud: it was not shewn that D. had the right to transfer it—the contrary appeared: *Bills of Exchange Act, sec. 138. Roblin v. Vanalstine, 99.*

See **BANKS AND BANKING—INTEREST, 2.**

PROOFS OF LOSS.

See **INSURANCE, 1, 3.**

PROPERTY PASSING.

See **COMPANY.**

PROPRIETARY OR PATENT MEDICINE ACT.

See **ONTARIO TEMPERANCE ACT, 1, 6.**

PROSTITUTION.

See **CRIMINAL LAW, 2, 3.**

PROVINCIAL LEGISLATURE.

See **ASSESSMENT AND TAXES, 3**—**CONSTITUTIONAL LAW—CRIMINAL LAW, 1**—**ONTARIO TEMPERANCE ACT, 6.**

PUBLIC POLICY.

See **WILL, 2.**

PURCHASER FOR VALUE WITHOUT NOTICE.

See **DITCHES AND WATER-COURSES ACT, 1.**

QUARRY.

See **RAILWAY, 2.**

RAILWAY.

1. *Carriage of Goods—Demand for Delivery after Earlier Refusal to Accept—Undertaking to Pay Charges—Acceptance—Waiver of Prepayment or Tender—Sale of Goods to Pay Charges—Delay in Transmitting Request for Return of Goods—Negligence—Damages—Carriers or Warehousemen—Shipping Contract—Special Provision as to Damages—Value of Goods at Date of Shipment—Application to Goods Held by Carriers as Warehousemen.*—In the circumstances of this case, it was held, that the defendants were liable in damages for goods sold to pay freight charges thereon; and, although on the 21st January, 1916, the defendants held the goods as warehousemen, they were entitled to the benefit of a provision in the shipping contract that “the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment . . .”—When the stipulation is one which, by its terms, is to apply to a state of things which may arise after the goods have arrived at their destination, it remains in force notwithstanding that the transit is ended.—*Swale v. Canadian Pacific R.W. Co.* (1913), 29 O.L.R. 634, distinguished.—*Mayer v. Grand Trunk R.W. Co.* (1880), 31 U.C.C.P. 248, referred to.—The damages were accordingly computed on the basis of the value of the goods in May, 1915, when they were shipped. *Getty and Scott Limited v. Canadian Pacific R.W. Co.*, 260.

RAILWAY—(Continued).

2. *Expropriation of Land—Compensation—Award—Quarry of Stone—Jurisdiction of Arbitrators—“Minerals”—Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 133—Determination of Question of Fact by Appellate Court—Sec. 90 (15) of Act.*—Upon an arbitration to determine the compensation to be paid to a landowner for land expropriated by the company for the purposes of its railway, and for severance, and by reason of injury and loss in respect of part of the land known as “the quarry,” and other injurious affection, the arbitrators in effect found that the rock comprising the quarry was the ordinary rock of the district, and stated that the quarry had a special value, which they estimated at a named sum, but allowed nothing for it in their award. They stated that they did not assume to decide whether they had jurisdiction to include it:—Held, that the rock was not a “mineral” within the meaning of the word “minerals” as used in sec. 133 of the Ontario Railway Act, R.S.O. 1914, ch. 185.—*Great Western R.W. Co. v. Carpalla United China Clay Co. Limited*, [1910] A.C. 83, *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116, *Caledonian R.W. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290, and *Symington v. Caledonian R.W. Co.*, [1912] A.C. 87, applied and followed.—The Court, on appeal from the award, instead of remitting the case to the arbitrators to find whether or not the rock was a

RAILWAY—(Continued).

mineral, determined the question upon the evidence (sec. 90(15) of the Act), and ordered that the compensation awarded should be increased by the sum named by the arbitrators. *Re McAllister and Toronto and Suburban R.W. Co.*, 252.

See DITCHES AND WATER-COURSES ACT, 2—EASEMENT—STREET RAILWAY.

REGISTRY LAWS.

See DITCHES AND WATER-COURSES ACT, 1.

RELEASE.

See ASSIGNMENTS AND PREFERENCES, 2—TRUSTS AND TRUSTEES, 2.

RELIGIOUS GIFTS.

See WILL, 2.

REMISSION OF PENALTIES.

See FINES AND PENALTIES.

REMISSION OF TAXES.

See ASSESSMENT AND TAXES, 2.

RENT.

See ATTACHMENT OF DEBTS, 2—LANDLORD AND TENANT, 1.

REPEAL OF BY-LAW.

See MUNICIPAL CORPORATIONS.

RES ADJUDICATA.

See CRIMINAL LAW, 2—VEXATIOUS PROCEEDINGS.

RESERVATION IN DEED.

See LIMITATION OF ACTIONS.

RESIDUARY GIFTS.

See WILL, 1, 2.

RESPONDEAT SUPERIOR.

See NEGLIGENCE, 2.

RESTRAINT OF TRADE.

See COVENANT.

RIGHT OF WAY.

See WAY.

ROMAN CATHOLIC SEPARATE SCHOOLS.

See EVIDENCE.

RULES.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 25 (1)(h).]—*See* WRIT OF SUMMONS.

Rule 124.]—*See* PLEADING.

Rule 134.]—*See* PARTIES.

Rule 138.]—*See* PLEADING.

Rule 145.]—*See* PLEADING.

Rule 165.]—*See* CONTRACT, 3.

Rule 205.]—*See* FINES AND PENALTIES.

Rule 207.]—*See* FINES AND PENALTIES.

Rule 228.]—*See* EVIDENCE.

Rules 338-341.]—*See* EVIDENCE.

Rule 373.]—*See* COSTS.

Rule 523.]—*See* VEXATIOUS PROCEEDINGS.

Rule 545.]—*See* CONTEMPT OF COURT—EVIDENCE.

Rule 546.]—*See* CONTEMPT OF COURT.

Rule 547.]—*See* CONTEMPT OF COURT.

Rule 557.]—*See* SHERIFF.

Rule 590.]—*See* ATTACHMENT OF DEBTS, 1.

Rule 773(f).]—*See* APPEAL, 1.

RULES—(Continued).

(Rules of the 27th March, 1908.)

Rule 1287.] — *See* CRIMINAL LAW, 2.**SALARY.***See* ASSESSMENT AND TAXES, 3.**SALE OF BUSINESS.***See* COVENANT.**SALE OF GOODS.***See* COMPANY—CONTRACT, 2, 3
—RAILWAY, 1.**SALE OF LAND.***See* ALIEN ENEMY—MORTGAGE, 2—VENDOR AND PURCHASER.**SALE OF LOGS.***See* SHERIFF.**SATISFACTION.***See* ASSIGNMENTS AND PREFERENCES, 2.**SCHOOLS.***See* EVIDENCE.**SEARCH-WARRANT.***See* ONTARIO TEMPERANCE ACT, 5.**SECURITIES.***See* BANKS AND BANKING.**SECURITY.***See* APPEAL, 2.**SECURITY FOR COSTS.***See* COSTS.**SENTENCE.***See* ONTARIO TEMPERANCE ACT, 3.**SEPARATE SCHOOLS.***See* EVIDENCE.**SET-OFF.***See* VEXATIOUS PROCEEDINGS.**SERVICE OUT OF JURISDICTION.***See* WRIT OF SUMMONS.**SHARES.***See* CONTRACT, 1—WRIT OF SUMMONS.**SHERIFF.**

*Sale of Logs under Execution—Rule 557—Advertisement of Sale—Misrepresentation as to Quantity of Logs—Effect of—Sale to Innocent Purchaser—Absence of Fraud—Liability of Sheriff—Action by Execution Debtors and Execution Creditors—Special Circumstances—Conduct—Estoppel—Failure to Prove Actual Damage—Negligence—Costs.]—The judgment of CLUTE, J., 39 O.L.R. 201, was reversed by a Divisional Court of the Appellate Division; RIDDELL and ROSE, JJ., dissenting in part.—Held, in this agreeing with the opinion of CLUTE, J., that failure to give the notice of a sheriff's sale under a *fi. fa.*, as required by Rule 557, or a defect in the notice, does not invalidate the sale to an innocent purchaser. — Review of the authorities.—The defendant P. was an innocent purchaser.—There was no fraud, and no ground upon which the defendant P. could be held answerable in damages to any party to this action.—In the special circumstances of the case, and having regard to the conduct of the plaintiffs, the defendant C., the sheriff, was not liable either to the execution debtors, the original plaintiffs, or to the execution*

SHERIFF—(Continued).

creditors, the added plaintiffs.—
But the sheriff was not entitled
to recover his costs of the action
from the plaintiffs, because of the
loose manner in which his duties
were performed. *Maple Leaf
Lumber Co. v. Caldbick and
Pierce*, 512.

SHORTAGE.

See CONTRACT, 2—TRUSTS AND
TRUSTEES, 2.

SPECIFIC PERFORMANCE.

See ALIEN ENEMY—VENDOR
AND PURCHASER.

STATEMENT OF CLAIM.

See PLEADING.

STATUTE OF FRAUDS.

See VENDOR AND PURCHASER.

STATUTE OF LIMITATIONS.

See CONTRACT, 1—LIMITATION
OF ACTIONS—TRUSTS AND TRUS-
TEES, 1, 2—WAY.

STATUTES.

30 & 31 Vict. ch. 3, secs. 91 (27), 92 (13),
(14) (Imp.) (British North Am-
erica Act).

See CONSTITUTIONAL LAW, 1.

51 Vict. ch. 29, sec. 146 (D.) (Railway
Act).

See EASEMENT.

2 Edw. VII. ch. 107, secs. 12, 21 (c)
(D.) (Toronto and Niagara Power
Company).

See EASEMENT.

4 Edw. VII. ch. 23, secs. 2 (8), 3, 5 (14)
(O.) (Assessment Act).

See ASSESSMENT AND TAXES, 3.

R.S.C. 1906, ch. 79 (Companies Act).

See CONSTITUTIONAL LAW, 2.

R.S.C. 1906, ch. 81, secs. 2 (f) (i.),
137 (Indian Act).

See ONTARIO TEMPERANCE ACT, 3.

R.S.C. 1906, ch. 119, sec. 138 (Bills
of Exchange Act).

See PROMISSORY NOTE.

R.S.C. 1906, ch. 139, sec. 76 (Supreme
Court Act).

See APPEAL, 2.

STATUTES—(Continued).

R.S.C. 1906, ch. 145, secs. 2, 5 (Evi-
dence Act).

See CONSTITUTIONAL LAW, 1.

R.S.C. 1906, ch. 146, sec. 74 (i)
(Criminal Code).

See ALIEN ENEMY.

R.S.C. 1906, ch. 146, secs. 164, 165,
390.

See EVIDENCE.

R.S.C. 1906, ch. 146, sec. 238.

See CRIMINAL LAW, 3.

R.S.C. 1906, ch. 146, secs. 238 (i),
239, 576, 683, 716, 721, 1124.

See CRIMINAL LAW, 2.

R.S.C. 1906, ch. 146, sec. 889.

See ONTARIO TEMPERANCE ACT, 3.

7 & 8 Edw. VII. ch. 56 (D.) (Proprietary
or Patent Medicine Act).

See ONTARIO TEMPERANCE ACT, 6.

7 & 8 Edw. VII. ch. 56, sec. 7 (D.)

See ONTARIO TEMPERANCE ACT, 1.

3 & 4 Geo. V. ch. 9, secs. 88, 90 (D.)
(Bank Act).

See BANKS AND BANKING.

R.S.O. 1914, ch. 1, sec. 25 (Interpreta-
tion Act).

See ONTARIO TEMPERANCE ACT, 3.

R.S.O. 1914, ch. 1, sec. 29 (x).

See ASSESSMENT AND TAXES, 2.

R.S.O. 1914, ch. 56, sec. 2 (r) (Judi-
cature Act).

See COSTS.

R.S.O. 1914, ch. 56, sec. 16 (b).

See PLEADING.

R.S.O. 1914, ch. 56, secs. 16 (h), 20.

See CONSTITUTIONAL LAW, 2.

R.S.O. 1914, ch. 56, sec. 24.

See INTEREST, 1.

R.S.O. 1914, ch. 56, sec. 28.

See TRIAL.

R.S.O. 1914, ch. 56, sec. 32.

See CRIMINAL LAW, 2.

R.S.O. 1914, ch. 56, sec. 43.

See APPEAL, 2.

R.S.O. 1914, ch. 59, sec. 32 (County
Courts Act).

See INTEREST, 1.

R.S.O. 1914, ch. 63, secs. 62 (1) (a),
69 (Division Courts Act).

See APPEAL, 1.

R.S.O. 1914, ch. 68, secs. 12, 37 (Lun-
acy Act).

See LUNATIC.

R.S.O. 1914, ch. 75 (Limitations Act).

See CONTRACT, 1—TRUSTS AND
TRUSTEES, 1.

R.S.O. 1914, ch. 75, sec. 35.

See WAY.

R.S.O. 1914, ch. 75, sec. 47.

See TRUSTS AND TRUSTEES, 2.

R.S.O. 1914, ch. 76, sec. 7 (Evidence
Act).

See CONSTITUTIONAL LAW, 1—EVI-
DENCE.

STATUTES—(Continued).

- R.S.O. 1914, ch. 80, secs. 10, 20 (Execution Act).
See ATTACHMENT OF DEBTS, 1.
 R.S.O. 1914, ch. 90, sec. 10 (3) (Summary Convictions Act).
See ONTARIO TEMPERANCE ACT, 6.
 R.S.O. 1914, ch. 99, sec. 6 (Fines and Forfeitures Act).
See FINES AND PENALTIES.
 R.S.O. 1914, ch. 102 (Statute of Frauds).
See VENDOR AND PURCHASER.
 R.S.O. 1914, ch. 103 (Mortmain and Charitable Uses Act).
See CONSTITUTIONAL LAW, 2.
 R.S.O. 1914, ch. 103, sec. 2 (2).
See WILL, 2.
 R.S.O. 1914, ch. 124, secs. 2 (d), 71 (1) (Registry Act).
See DITCHES AND WATERCOURSES ACT, 1.
 R.S.O. 1914, ch. 134 (Assignments and Preferences Act).
See ASSIGNMENTS AND PREFERENCES, 1, 2.
 R.S.O. 1914, ch. 134, sec. 38.
See CONSTITUTIONAL LAW, 1.
 R.S.O. 1914, ch. 151 (Fatal Accidents Act).
See NEGLIGENCE, 1.
 R.S.O. 1914, ch. 154, sec. 3 (Illegitimate Children's Act).
See BASTARD.
 R.S.O. 1914, ch. 155, secs. 2 (b), (d), 75 *et seq.* (Landlord and Tenant Act).
See LANDLORD AND TENANT, 2.
 R.S.O. 1914, ch. 155, sec. 38.
See LANDLORD AND TENANT, 1.
 R.S.O. 1914, ch. 156, sec. 4 (Apportionment Act).
See ATTACHMENT OF DEBTS, 2.
 R.S.O. 1914, ch. 175 (Money-Lenders Act).
See INTEREST, 2.
 R.S.O. 1914, ch. 178, sec. 135 (Companies Act).
See FINES AND PENALTIES.
 R.S.O. 1914, ch. 179 (Extra-Provincial Corporations Act).
See CONSTITUTIONAL LAW, 2.
 R.S.O. 1914, ch. 183, secs. 171 (5), 178 (Insurance Act).
See INSURANCE, 5.
 R.S.O. 1914, ch. 183, sec. 176 (2).
See INSURANCE, 4.
 R.S.O. 1914, ch. 183, sec. 194 (conditions 11, 15).
See INSURANCE, 2.
 R.S.O. 1914, ch. 183, secs. 194 (condition 18 (c)), 197, 199.
See INSURANCE, 3.

STATUTES—(Continued).

- R.S.O. 1914, ch. 183, secs. 194 (conditions 18, 22), 199.
See INSURANCE, 1.
 R.S.O. 1914, ch. 185, secs. 90 (15), 133 (Railway Act).
See RAILWAY, 2.
 R.S.O. 1914, ch. 192, sec. 347 (Municipal Act).
See MUNICIPAL CORPORATIONS.
 R.S.O. 1914, ch. 195, secs. 2 (e), 5 (15) (Assessment Act).
See ASSESSMENT AND TAXES, 3.
 R.S.O. 1914, ch. 195, secs. 10 (1) (a), 80 (6).
See ASSESSMENT AND TAXES, 1.
 R.S.O. 1914, ch. 195, secs. 10, 56, 70, 95, 118 (1).
See ASSESSMENT AND TAXES, 2.
 R.S.O. 1914, ch. 199, sec. 7 (Municipal Arbitrations Act).
See MUNICIPAL CORPORATIONS.
 R.S.O. 1914, ch. 207, sec. 16 (1), 23 (Motor Vehicles Act).
See MOTOR VEHICLES ACT.
 R.S.O. 1914, ch. 218, sec. 58 (Public Health Act).
See NEGLIGENCE, 1.
 R.S.O. 1914, ch. 231, sec. 18 (d) (Children's Protection Act).
See CRIMINAL LAW, 1.
 R.S.O. 1914, ch. 260 (Ditches and Watercourses Act).
See DITCHES AND WATERCOURSES ACT, 1.
 R.S.O. 1914, ch. 260, secs. 6, 13, 16, 21, 22, 23.
See DITCHES AND WATERCOURSES ACT, 2.
 R.S.O. 1914, ch. 270, sec. 99 (Separate Schools Act).
See EVIDENCE.
 R.S.O. 1914, ch. 295, sec. 36 (Hospitals for the Insane Act).
See INSURANCE, 4.
 4 Geo. V. ch. 30, sec. 10 (O.) (Amending Insurance Act).
See INSURANCE, 4.
 5 Geo. V. ch. 22, secs. 2 (1), 4 (O.) (Mortgagors and Purchasers Relief Act).
See MORTGAGE, 1.
 6 Geo. V. ch. 27, sec. 1 (O.) (Amending Mortgagors and Purchasers Relief Act).
See MORTGAGE, 1.
 6 Geo. V. ch. 50, secs. 2 (f), 88, 125 (O.) (Ontario Temperance Act).
See ONTARIO TEMPERANCE ACT, 1.
 6 Geo. V. ch. 50, sec. 40 (O.)
See ONTARIO TEMPERANCE ACT, 5.
 6 Geo. V. ch. 50, secs. 40, 85, 88, 92 (2), 124, 125, 129, 131 (O.)
See ONTARIO TEMPERANCE ACT, 6.

STATUTES—(Continued).

- 6 Geo. V. ch. 50, sec. 41 (1) (O.)
See ONTARIO TEMPERANCE ACT,
 3, 4.
- 6 Geo. V. ch. 50, secs. 41, 43, 74,
 88 (O.)
See ONTARIO TEMPERANCE ACT, 2.
- 6 & 7 Geo. V. ch. 19, sec. 4 D (D.)
 (Provincial Intoxicating Liquors
 Legislation).
See ONTARIO TEMPERANCE ACT,
 1, 6.
- 7 Geo. V. ch. 42, sec. 6 (O.) (Amending
 Municipal Act).
See MUNICIPAL CORPORATIONS.
- 7 Geo. V. ch. 45, secs. 9, 11 (O.)
 (Amending Assessment Act).
See ASSESSMENT AND TAXES, 2.
- 7 Geo. V. ch. 50, sec. 14 (O.) (Amend-
 ing Ontario Temperance Act).
See ONTARIO TEMPERANCE ACT, 2.
- 7 & 8 Geo. V. ch. 30, sec. 2 (D.)
 (Amending Act respecting Prov-
 incial Intoxicating Liquors Leg-
 islation).
See ONTARIO TEMPERANCE ACT,
 1, 6.

STAY OF ACTION.

See VEXATIOUS PROCEEDINGS.

STAY OF EXECUTION.

See APPEAL, 2.

STAY OF INJUNCTION.

See APPEAL, 2.

STREET RAILWAY.

1. *Injury to Passenger Alighting from Car — Invitation to Alight while Car Moving — Opening of Exit-door — Evidence — Findings of Jury — Negligence — Absence of Contributory Negligence — Duty of Appellate Court where Verdict Supported by Reasonable Evidence.*—The opening of the door of a standing train or street-car, at a regular stopping place, is *prima facie* an invitation to alight; opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably

STREET RWAY.—(Continued).

careful passenger is not, without more, an invitation to alight; opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; circumstances alter cases, and each of these kinds must depend on its own circumstances.—Review of the authorities.—In a case where the jury found that the plaintiff was injured by reason of the negligence of the motor-man of a street-car in opening the door of the car, to allow the plaintiff to get off, before the car was stopped.—*Held*, that it could not be said that there was no evidence to support the finding of the jury, or that the jury acted unreasonably in finding, that the opening of the door was a negligent act.—If there is any reasonable evidence to support the finding of the jury, their verdict should stand; it is not the duty of an appellate Court to be subtle and astute to find reasons for setting aside verdicts.—*Commissioner for Railways v. Brown* (1887), 13 App. Cas. 133, 134, and *Toronto R.W. Co. v. King*, [1908] A.C. 260, 270, referred to. *Gazey v. Toronto R.W. Co.*, 449.

2. *Injury to Person Attempting to Enter Moving Car — "Invitation" — Sudden Increase of Speed — Negligence — Contributory Negligence — Evidence — Findings of Jury.*—The plaintiff, a workman, elderly but active, was crossing from the north side of a street to the south with the intention of becoming a passen-

STREET RWAY.—(*Continued*).

ger upon an east-bound car of the defendants, which had reached a stopping place and was standing still, and which he could not enter except by the rear-door on the south side. The car began to move when he was about half-way across the street, but the motorman motioned him to go in front of the car, and stopped it; the plaintiff passed in front of the car and proceeded to the rear-end of it; before he reached that end, the car had (without any signal from the conductor) begun to move slowly; the plaintiff attempted to step on; but, as he did so, the car gave "a sudden jolt forward," he failed to get on the step of the platform, fell, and was injured. At the trial of an action for damages for his injuries, there was no conflict of testimony; and the jury found: (1) that the plaintiff was invited by the motorman to get on the car when it was in motion; (2) that the danger of getting on the car when in motion was not so obvious that a reasonable man would not have accepted the invitation; (3) that the plaintiff's injuries were caused by the negligence of the defendants; (4) in "not seeing the passenger on safely on the car;" (5) no contributory negligence:—*Held* (RIDDELL, J., *dubitante*), that the findings were such as reasonable men might make upon the evidence; and a judgment for the plaintiff was affirmed. — Discussion of the question of invitation. *Hill v. Toronto R.W. Co.*, 393.

See NEGLIGENCE, 3.

STRIKE.

See CONTRACT, 3.

SUBSTANTIAL WRONG.

See TRIAL.

SUMMARY CONVICTIONS ACT.

See ONTARIO TEMPERANCE ACT, 6.

SUMMARY EJECTMENT.

See LANDLORD AND TENANT, 2.

SUPREME COURT OF CANADA.

See APPEAL, 2.

SUPREME COURT OF ONTARIO.

See APPEAL, 1.

SURETY.

See ASSIGNMENTS AND PREFERENCES, 2.

SURROGATE COURTS.

See COSTS.

TAXES.

See ASSESSMENT AND TAXES.

TEMPERANCE.

See ONTARIO TEMPERANCE ACT.

TENANCY AT WILL.

See TRUSTS AND TRUSTEES, 1.

TENANT.

See FIXTURES — LANDLORD AND TENANT — LIMITATION OF ACTIONS.

TENDER.

See INSURANCE, 2.

TERMINATION OF INSURANCE.

See INSURANCE, 2.

THIRD PARTIES.

See CONTRACT, 3.

TIME.

See APPEAL, 1—CONTRACT, 3
—COVENANT—FIXTURES—INSURANCE, 1—LANDLORD AND TENANT, 1—LIMITATION OF ACTIONS—TRUSTS AND TRUSTEES.

TITLE TO LAND.

See APPEAL, 1.

TRADING COMPANY.

See COMPANY.

TRADING WITH THE ENEMY

See ALIEN ENEMY.

TRESPASS TO LAND.

See APPEAL, 1—FIXTURES.

TRIAL.

Action for Breach of Promise of Marriage—Jury—Prejudice to Defendant—Evidence as to Origin—Alien Enemy—Address of Counsel for Plaintiff to Jury—Evidence of Accusations Made by Relatives of Defendant against Plaintiff—Evidence of Attempt of Relatives to Deport Plaintiff—Improper Admission of—Excessive Damages—Failure of Trial Judge to Caution Jury—Substantial Wrong—Judicature Act, sec. 28—New Trial—Objections not Made at Trial.—In an action for breach of promise of marriage, a verdict for the plaintiff for \$5,000 damages was set aside and a new trial directed (MAGEE and HODGINS, JJ.A., dissenting), on the grounds: (1) that the

TRIAL—(Continued).

defendant was prejudiced before the jury by the fact as to his place of birth (Austria) being brought out in evidence and his enemy origin contrasted with that of the plaintiff, a citizen of a friendly country, and by counsel for the plaintiff alluding thereto in his address to the jury; (2) that, while it was not improper to give evidence of what passed between the defendant and the plaintiff with reference to accusations which the relatives of the defendant were said to have made against the plaintiff, it was improper to admit evidence that these statements had in fact been made; (3) that evidence of a complaint made by a relative of the defendant to an Immigration officer, with a view to having the plaintiff deported, was improperly admitted; (4) that the damages were excessive, and it was not unreasonable to conclude that they were aggravated by the introduction of evidence which should not have been admitted; and (5) that the trial Judge had not warned the jury against allowing their conclusions to be affected by the fact, if they found it to be a fact, that the defendant's relatives had made untrue accusations against the plaintiff or had sought to have her deported, nor had he cautioned the jury against being affected one way or the other by the evidence that had been admitted as to the racial origins of the parties.—There had been substantial wrong to the defendant, within the meaning of sec. 28 of

TRIAL—(Continued).

the Judicature Act; and he should not be denied a new trial because his counsel failed to object at the trial to the evidence and acts complained of upon appeal. *D. v. B.*, 112.

See **APPEAL**, 1.

TRUSTS AND TRUSTEES.

1. *Absolute Conveyance of Land—Unexpressed Trust in Favour of Children of Grantor—Declaration by Court of Equity—Adverse Possession of Children—Limitations Act—Acts Relied on as Preventing Running of Statute—Tenancy at Will—Caretaker.*—In 1894, H. conveyed his home-stead farm to the plaintiff, his son-in-law and neighbour, by a deed absolute in form, and died in the following year. At this time, there lived upon the farm H.'s eldest daughter, who was deaf and dumb, and three of his other children, who were very young. After the deed, H. remained in possession of the farm until his death; and after his death the four children remained in undisturbed possession of it until the death of the eldest, shortly before this action was begun. The purpose of the action was to evict the three remaining children, the defendants, who still remained in possession. The plaintiff said that it was understood between him and H. that the eldest daughter should stay upon the farm as long as she lived:—*Held*, that the deed to the plaintiff was given and taken upon a trust under which the children were to

TRUSTS & TRUSTEES—(Cont.)

have the benefit of the property conveyed—a trust which the plaintiff had not fulfilled, and one which would be violated in giving effect to the deed in the manner sought by the plaintiff; and so the action could not succeed in this Court of Equity.—*Held*, also, that, if there was no trust, the plaintiff's claim was defeated by the Limitations Act.—Certain acts of the plaintiff relied upon by him as preventing the running of the statute in the defendants' favour were based upon tacit or expressed leave or were done in the interests of the defendants by the plaintiff as their brother-in-law and neighbour.—There was no evidence of a tenancy at will; and no evidence that the defendants or their father or sister were mere caretakers. *May v. Hainer*, 436.

2. *Settlement with and Release of Trustee—Shortage in Accounts—Innocent Mistake—Ground for Setting aside Release—Absence of Fraud—Limitations Act, R.S.O. 1914, ch. 75, sec. 47—Interest of Beneficiary—Interest in Possession—Time when Statute Began to Run in Favour of Trustee.*—Innocent error was held sufficient to invalidate the release of a trustee by two of the beneficiaries.—*In re Garnett* (1885), 31 Ch. D. 1, followed.—But, it not being alleged or proved that the trustee was guilty of fraud or that he had retained or converted to his own any of the trust property, he was held entitled to the benefit of the Limitations Act, R.S.O. 1914, ch. 75, sec. 47.

TRUSTS & TRUSTEES—(Cont.)

—*Held*, also, that the effect of the transaction of 1899 and of the release was to convert the plaintiff's interest in remainder into an interest in possession (sec. 47 (2) (b)); and, therefore, the statute began to run against him in 1899, and his right to recover was, at the time of the commencement of this action, barred. *Lees v. Morgan*, 233.

See WILL, 2.

ULTIMATE NEGLIGENCE.

See NEGLIGENCE, 3.

UNDERTAKING.

See INJUNCTION.

UNDUE INFLUENCE.

See GIFT.

UNSAFE PREMISES.

See NEGLIGENCE, 4.

VAGRANCY.

See CRIMINAL LAW, 2, 3.

VEHICLE.

See MOTOR VEHICLES ACT—NEGLIGENCE, 3—*ONTARIO TEMPERANCE ACT*, 2.

VENDOR AND PURCHASER.

Agreement for Sale of Land—Memorandum Signed by Purchaser only—Action by Vendor for Specific Performance—Description of Land—Uncertainty—Statute of Frauds—Parol Evidence to Identify Parcel Sold—Inadmissibility.—The plaintiff alleged that he sold to the defendant the east half of his (the plaintiff's) farm of 100 acres, and, asking for specific performance, offered

VEN. & PURCHASER—(Cont.)

as evidence of an agreement a memorandum in writing, signed by the defendant only, as follows: "A. E. S. sells and J. C. buys the 50 acres of land across the road from him for the sum of \$4,000 cash:"—*Held*, that the writing did not identify the 50 acres sold sufficiently to satisfy the Statute of Frauds, and parol evidence as to which 50 acres was intended was inadmissible. —According to the evidence, the parties did not go upon the farm, and the particular 50 acres was not pointed out, and that served to distinguish this case from many authorities—such as *Plant v. Bourne*, [1897] 2 Ch. 281—in which the material facts were ascertained or could be ascertained, by plan or definite location or measurement, or the fact that the parties had gone over the property and identified it in the course of the negotiations, so that the subject-matter could be made certain.—*Held*, also, that the case was not, in its circumstances, one in which specific performance should be adjudged. *Sparks v. Clement*, 487.

See ALIEN ENEMY.

VENEREAL DISEASE.

See CRIMINAL LAW, 3.

VEXATIOUS PROCEEDINGS.

Application to Stay Action as Frivolous and Vexatious—Former Litigation—Claims not Identical—Banker and Customer—Accounts—Judgment—Res Adjudicata—Fraud—Rule 523—Right to Impeach Judgment in

VEXATIOUS PROC.—(Cont.)

Subsequent Action—Dismissal of Actions for Failure to Comply with Orders for Security for Costs—Not a Bar to Subsequent Action for same Cause—Leave to Proceed—Condition—Payment of Costs of Former Actions—Set-off.]

—An order of MASTEN, J., perpetually staying the proceedings in this action, on the ground that it was frivolous and vexatious and an abuse of the process of the Court, was on appeal set aside by a Divisional Court (MEREDITH, C.J.C.P., dissenting); and the plaintiff was allowed to proceed, on paying the costs of two former actions brought respectively in 1913 and 1916 against the same defendants for the same causes, which actions were dismissed for default of compliance with orders for security for costs, such costs to be set off *pro tanto* against the plaintiff's costs of the appeal and of the application upon which the order appealed against was made.—The dismissal of an action for failure to comply with an order for security for costs is not a bar to another action for the same cause; but the Court has inherent power to stay the second action till the costs of the first are paid.—Nearly all the claims in the present action were new, at least in form, and had not been specifically disposed of by a judgment pronounced in 1897 in a former action. There was no *res adjudicata* apparent concerning them; the defendants might, if so advised, plead *res adjudicata* as to all the claims.—

VEXATIOUS PROC.—(Cont.)

It was open to the plaintiff to move under Rule 523 to impeach the judgment on the ground of fraud subsequently discovered, but he was not bound to do so. He might proceed by action; and, if the defendants pleaded *res adjudicata*, he might amend by setting up fraud and claiming to have the former judgment set aside *pro tanto*. *Smith v. Merchants Bank of Canada*, 309.

VOLUNTARY CONVEYANCE.

See GIFT.

WAIVER.

See INSURANCE, 3—RAILWAY, 1.

WAR.

See ALIEN ENEMY.

WAREHOUSEMEN.

See RAILWAY, 1.

WARRANTY.

See CONTRACT, 2.

WATER.

See DITCHES AND WATER-COURSES ACT.

WAY.

Public or Private Lane in City—Dedication as Highway—Evidence—Onus—Intention of Owner of Land—Acceptance—Public User—Tolerance—Absence of Municipal Action—Right of Way—Easement—Devise—Lost Grant—Prescriptive Right—Limitations Act, sec. 35.]—A lane 12 feet wide, was held, not to be a public highway, the defendants failing to establish a ded-

WAY—(Continued).

ication of it by the owner of the land of which it formed part; and, if dedication were shewn, the evidence of acceptance thereof being insufficient.—The onus of proving dedication and acceptance was on the defendants; proof of the owner's intention to dedicate was essential, and was entirely lacking; and such user of the lane by the public as was shewn must be ascribed to tolerance rather than to right. There was no municipal action in regard to the paving, repairing, lighting, etc., of the lane, such as might constitute an acceptance by the municipal corporation. — Review of the authorities.—The effect of a judgment, pronounced in 1877, in an action between two tenants for years, finding the lane in question to be a public lane, discussed. The judgment was regarded as evidence in the defendants' favour, but not as an estoppel in whole or in part. —*Neill v. Duke of Devonshire* (1882), 8 App. Cas. 135, distinguished. — The alternative claim of the defendants to a right of way over the lane with access to their land, under a devise, or a lost grant, or by virtue of sec. 35 of the Limitations Act, R.S.O. 1914, ch. 75, was not maintainable. *Baldwin v. O'Brien*, 24.

WILL.

1. *Construction.* — *Inconsistent Residuary Gifts—Effect Given to Later one.*—The rule that where two clauses in a will are repugnant and incapable of reconcili-

WILL—(Continued).

ation the later must prevail, applies to inconsistent residuary clauses. But, if there are two gifts in the same instrument, each sufficient to include the residuary estate, in a case where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred—i.e., the "rule of thumb" is not applicable because a meaning can be attributed to the last clause which removes the apparent repugnancy.—After giving many substantial specific legacies, a testator in his will said: "The residue of my estate to go to the deserving poor of F." Then followed this clause: "Balance of my estate divided between those in the will *pro rata*." —*Held*, that the two clauses were hopelessly inconsistent, and effect must be given to the last gift as the last intention of the testator.—Review of the authorities. *Re Nolan*, 355.

2. *Validity of Bequests—Charitable and Religious Gifts—Trusts—Objects of Bounty—Christian Science Churches—Public Policy—Gift for "Purpose Beneficial to the Community"—Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103, sec. 2 (2)—Application to Personal Estate—"And whatever may seem to Require Assistance"—Uncertain Bequests—Rule against Perpetuities — Residuary Bequest—"Used for God only"—Presumption against Intestacy—Effective Expression of Intention—Invalid Bequests—Funds Falling into Res-*

WILL—(Continued).

*idue—General Charitable Intention—Application of Fund Cyprès—Execution of Trust—Indefiniteness of Objects—Reference to Propound Scheme for Application of Residuary Estate.]—*The will of a testatrix, who was a Christian Scientist, making numerous money bequests for religious and charitable purposes, some of them being for aid to institutions connected with Christian Science, was upheld, and most of the bequests were declared valid as good charitable bequests and not void for uncertainty or otherwise.—The specific bequests amounted to about \$110,000, while the value of the whole estate was more than \$200,000. After the bequests, the will said: "The whole of my estate must be used for God only." This was held to be a valid declaration of trust disposing of the remainder of the estate of the testatrix—a good charitable trust for religious purposes; and that the money bequeathed by any invalid bequest fell into this residue and was impressed with the trust for religious purposes.—The other questions raised, as to the meaning and construction of the will, are set out in the report, and are summarised in the headnote.—The following cases were followed: *Thornton v. Howe* (1862), 31 Beav. 14; *In re Allen*, [1905] 2 Ch. 400, 21 Times L.R. 662; *Cocks v. Manners* (1871), L.R. 12 Eq. 574; *Chamberlayne v. Brockett* (1872), L.R. 8 Ch. 206; *Phelps v. Lord* (1894), 25 O.R. 259; *In re Darling*, [1896] 1 Ch. 50; *In re University of*

WILL—(Continued).

London Medical Sciences Institute Fund, [1909] 2 Ch. 1. *Rex v. Lewis* (1903), 6 O.L.R. 132, was distinguished. *Re' Orr*, 567.

See COSTS—INSURANCE, 5.

WINDING-UP.

See BANKS AND BANKING—COMPANY.

WITNESSES.

See CRIMINAL LAW, 2—EVIDENCE—ONTARIO TEMPERANCE ACT, 2, 5.

WORDS.

"And whatever may seem to Require Assistance."—See WILL, 2.

"As to Costs only."—See INTEREST, 1.

"Assisting."—See ALIEN ENEMY.

"Business of a Distiller."—See ASSESSMENT AND TAXES, 1.

"Court or Judge having Cognizance of the Proceedings."—See FINES AND PENALTIES.

"Direct Loss."—See INSURANCE, 1.

"Enemy."—See ALIEN ENEMY.

"Execution of the Assignment."—See LANDLORD AND TENANT, 1.

"Good Cause of Action upon a Contract."—See WRIT OF SUMMONS.

"Hard Labour."—See ONTARIO TEMPERANCE ACT, 3.

"Imperial."—See ASSESSMENT AND TAXES, 3.

"Income."—See ASSESSMENT AND TAXES, 3.

"Indian."—See ONTARIO TEMPERANCE ACT, 3.

WORDS—(Continued).

"Instrument Affecting the Land."—See DITCHES AND WATERCOURSES ACT, 1.

"Insurable Interest."—See INSURANCE, 1.

"Invitation."—See STREET RAILWAY, 2.

"Maintenance or Benefit of the Lunatic or of his Family."—See LUNATIC.

"May."—See LANDLORD AND TENANT, 2.

"Minerals."—See RAILWAY, 2.

"Money-lenders."—See INTEREST, 2.

"Neglected Child."—See CRIMINAL LAW, 1.

"Occupant."—See LANDLORD AND TENANT, 2.

"Office."—See ASSESSMENT AND TAXES, 3.

"Our Joint Property."—See HUSBAND AND WIFE.

"Person."—See ASSESSMENT AND TAXES, 2.

"Person Entitled to Possession."—See LANDLORD AND TENANT, 2.

"Plaintiff."—See COSTS.

"Private Dwelling-house."—See ONTARIO TEMPERANCE ACT, 4.

"Purpose Beneficial to the Community."—See WILL, 2.

"Really."—See BASTARD.

"Removal from Municipality of Person Assessed."—See ASSESSMENT AND TAXES, 2.

"Salary."—See ASSESSMENT AND TAXES, 3.

"Satisfactory Account of herself."—See CRIMINAL LAW, 2.

"Substantial Wrong."—See TRIAL.

"Therewith."—See INSURANCE, 2.

"Trading with the Enemy."—See ALIEN ENEMY.

WORDS—(Continued).

"Used for God only."—See WILL, 2.

"Wine."—See ONTARIO TEMPERANCE ACT, 1, 6,

WRIT OF ATTACHMENT.

See CONTEMPT OF COURT.

WRIT OF FIERI FACIAS.

See APPEAL, 2—ATTACHMENT OF DEBTS—SHERIFF.

WRIT OF SUMMONS.

Foreign Defendants—Service of Notice of Writ out of Ontario—Action for Declaration of Right to Make Calls on Company-shares—Rule 25 (1) (h)—Assets in Ontario—"Good Cause of Action upon a Contract"—Conditional Appearance.—An action for a declaration that certain shares of the stock of the plaintiff company (incorporated in Ontario) standing in the names of the defendants, who resided out of Ontario, were not fully paid-up and were assessable and subject to call, was held to be an action based upon the contract existing between the shareholders and the company.—It was shewn that the defendants had assets in Ontario of the value of \$200; and held, that the plaintiffs had "a good cause of action against the defendants upon a contract," within the meaning of Rule 25 (1) (h).—Therefore, an application to set aside the service upon the defendants out of Ontario of a notice of the writ of summons was dismissed; but, as there was some doubt, the defendants were allowed to enter a conditional appearance. *Superior Copper Co. Limited v. Perry*, 467.



